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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1621

BYRON TIMOTHY LIGGETT, M. D.,
Appellant,

vs.

STATE OF KANSAS EX REL., CURT T. SCHNEIDER, ATTORNEY GENERAL OF THE STATE OF KANSAS, KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

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BYRON TIMOTHY LIGGETT, M. D.,
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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

STATEMENT AS TO JURISDICTION

Pursuant to Rules 13(2) and 15 of the Supreme Court of the United States, appellant, Byron Timothy Liggett, M. D., appeals from the judgment of the Supreme Court of Kansas entered on March 10, 1978, and submits this statement to show that the Supreme Court of the United

States has jurisdiction of this appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the Supreme Court of Kansas, not yet reported except as Docket No. 49466, is included herein as Appendix A, infra pp A1-A16. The decision of the Barton County District Court affirming the constitutionality of K. S. A. 1976 Supp. 40-3402 is included herein as Appendix B, infra pp B1-B7, is not reported.

BASIS OF JURISDICTION

(i) This action was commenced in the District Court of Barton County, Kansas, by the Attorney General of the State of Kansas pursuant to K. S. A. 1976 Supp. 40-3416[1] to enjoin appellant, Byron Timothy Liggett, a duly licensed physician under the Kansas Healing Arts Act, K. S. A. 65-2801, et seq., from practicing medicine within the State of Kansas for his failure to comply with K. S. A. 1976 Supp. 40-3402(a), i. e., purchase and maintain professional

1. K. S. A. 1976 Supp. 40-3416: Whenever the commissioner is informed or reasonably suspects that a health care provider is rendering professional services in violation of K. S. A. 1976 Supp. 40-3402, said commissioner shall report the suspected violation to the state agency which licenses, registers or certifies such health care provider. Upon receipt of such report or other evidence of a violation of K. S. A. 1976 Supp. 40-3402, said state agency shall make such investigation as it deems necessary and take such other official action as deemed appropriate. If a violation is found to exist, said state agency shall promptly notify the attorney general of this state. Upon such notice the attorney general or county attorney of the proper county shall, in the name of the state, institute and maintain an action to enjoin the health care provider from rendering professional services in this state in the district court of the district in which such health care provider is rendering professional services.

liability insurance of not less than one hundred thousand dollars ($100,000.00) per occurrence, subject to not less than a three hundred thousand dollar ($300,000.00) annual aggregate for all claims made during the policy period.

(ii) The judgment of the District Court of Barton County, Kansas, entered August 2, 1977 (Appendix B), affirmed the constitutionality of K. S. A. 1976 Supp. 40-3402 and enjoined appellant from the further practice of medicine within the State of Kansas. On August 16, 1977, the District Court of Barton County, Kansas, denied appellant's motion to make additional findings of fact, conclusions of law and to amend the court's August 2, 1977 judgment (Appendix C) and find K. S. A. 1976 Supp. 40-3402 in contravention of the due process clause of the Fourteenth Amendment of the United States Constitution for having no rational connection to appellant's ability or capacity to practice medicine (Appendix D).

Thereafter, appeal was taken of the trial court's order of August 2, 1977, and ruling of August 16, 1977, to the Appellate Courts of the State of Kansas. By joint motion of all parties, said appeal was transferred from the Kansas Appellate Court to the Kansas Supreme Court. The judgment of the Supreme Court of Kansas was entered March 10, 1978. No motion for rehearing was filed. Notice of appeal to the Supreme Court of the United States was timely filed with the Supreme Court of the State of Kansas on April 3, 1978. (Copy of notice of appeal attached hereto, see Appendix E.)

(iii) The jurisdiction of the United States Supreme Court to review the decision by appeal is conferred by 28 USCS 1257(2). The question raised and adjudicated was whether K. S. A. 1976 Supp. 40-3402 transgressed the Due Process Clause of the Fourteenth Amendment of the

United States Constitution. The decision of the Supreme Court of the State of Kansas was in favor of its validity.

(iv) The following cases sustain the jurisdiction of this Court to review the March 10, 1978, judgment of the Kansas Supreme Court: *Dent* v. *West Virginia,* (1889) 129 US 114, 32 L Ed 623, 9 S Ct 231; *Hamilton* v. *Regents,* (1934) 293 US 245, 79 L Ed 343; *Juidice* v. *Vail,* (1977) ..... US ....., 51 L Ed 2d 376, 97 S Ct 1211; *Mishkin* v. *New York,* (1966) 383 US 502, 16 L Ed 2d 56, 86 S Ct 958; *Schware* v. *Board of Bar Examiners,* (1957) 353 US 232, 1 L Ed 2d 796, 77 S Ct 752; *Konigsberg* v. *State Bar of California,* (1957) 353 US 252, 1 L Ed 2d 810, 77 S Ct 722; *Konigsberg* v. *State Bar of California,* (1961) 366 US 36, 6 L Ed 2d 105, 81 S Ct 997; *Smith* v. *Texas,* (1913) 233 US 629, 58 L Ed 1129, S. C. Reporter's Ed 630-642.

(v) The statute involved is K. S. A. 1976 Supp. 40-3402(a) to be found at page 72 of Volume 3A, 1977 Cumulative Pocket-Part Supplement to Kansas Statutes Annotated:

> K. S. A. 1976 Supp. 40-3402(a). (a) A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than one hundred thousand dollars ($100,000) per occurrence, subject to not less than a three hundred thousand dollar ($300,000) annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state, unless such health care provider is a self-insurer. Such policy shall provide as a minimum coverage for claims made during the term of the policy

> which were incurred during the term of such policy or during the prior term of a similar policy. (For complete statute see Appendix H)

QUESTION PRESENTED

Did the Supreme Court of the State of Kansas in its opinion of March 10, 1978, err, misconstrue and fail to adhere to the rational connection principle or test promulgated by this court by its failure to find K. S. A. 1976 Supp. 40-3402(a) denied appellant due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution and by enjoining and prohibiting appellant, a duly licensed and practicing physician under the Healing Arts Act of Kansas, K. S. A. 65-2801, et seq., from pursuing further his profession within the State of Kansas for a reason that has no rational connection to appellant's fitness or capacity to practice medicine, i. e., appellant's failure to purchase and maintain professional liability insurance in an amount of not less than one hundred thousand dollars ($100,000.00) per occurrence, subject to not less than three hundred thousand dollars ($300,000.00) annual aggregate for all claims made during the policy period.

STATEMENT OF THE CASE

The appellant, Byron Timothy Liggett, M. D., is a physician and surgeon licensed by the Kansas State Board of Healing Arts for the Practice of Medicine and Surgery. Appellant's license has been renewed during this litigation and remains valid at this time. No allegation has been made concerning appellant's competency (Appendix A, p A5).

Appellant is within the definition of a health care provider as defined by K. S. A. 1976 Supp. 40-3401(f).[2] Consequently, although licensed and competent to practice medicine, appellant cannot do so until the condition of K. S. A. 1976 Supp. 40-3402(a) is satisfied, i. e., purchase and maintain professional liability insurance of not less than one hundred thousand dollars ($100,000.00) per occurrence, subject to not less than three hundred thousand dollars ($300,000.00) annual aggregate for all claims made during the policy period. Appellant has refused to purchase and maintain professional liability insurance as a condition to practice medicine for the reasons hereinafter set forth in heading entitled "Substantiality of Federal Question".

Consequently, this action was commenced in the District Court of Barton County, Kansas, by the Attorney General of the State of Kansas pursuant to K. S. A. 1976

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2. K. S. A. 1976 Supp. 40-3401(f): Health care provider means a person licensed to practice any branch of the healing arts by the state board of healing arts, a person who holds a temporary permit to practice any branch of the healing arts issued by the state board of healing arts, a person engaged in a postgraduate training program approved by the state board of healing arts, a medical care facility licensed by the department of health and environment (excluding any medical care facility under the supervision and control of the state board of regents, within the department of social and rehabilitation services or within the department of human resources), a health maintenance organization issued a certificate of authority by the commissioner of insurance, an optometrist licensed by the board of examiners in optometry, a podiatrist registered by the state board of healing arts, a pharmacist registered by the state board of pharmacy, a licensed professional nurse who is licensed by the board of nursing and certified as a nurse anesthetist by the American association of nurse anesthetists, a professional corporation organized pursuant to the professional corporation law of Kansas by persons who are authorized by such law to form such a corporation and who are health care providers as defined by this subsection, a dentist certified by the state board of healing arts to administer anesthetics under K. S. A. 1977 Supp. 65-2899, a physical therapist registered by the state board of healing arts, or a mental health center or mental health clinic licensed by the secretary of social and rehabilitation services.

Supp. 40-3416 to enjoin appellant, a duly licensed physician and surgeon, from the further practice of medicine within Kansas for noncompliance with K. S. A. 1976 Supp. 40-3402(a).

In answer and defense to the state's petition, appellant challenged the constitutionality of K. S. A. 1976 Supp. 40-3402(a), specifically stating that said statute violated the due process clause of the Fourteenth Amendment of the United States Constitution by requiring appellant and other physicians to satisfy a condition to practice medicine which has no rational connection to a physician's fitness or capacity to practice. (See appellant's answer filed with the District Court of Barton County, Kansas, Appendix F, p F3.)

On July 5, 1977, in the District Court of Barton County, Kansas, the state conceded that no rational connection existed between the condition that appellant purchase and maintain medical malpractice insurance and his ability to practice medicine (Appendix G). The Kansas Supreme Court confirmed this admission by the State of Kansas (Appendix A, pp A4-A5).

On August 2, 1977, the trial court affirmed the constitutionality of K. S. A. 1976 Supp. 40-3402(a) and enjoined appellant from the further practice of medicine within Kansas (Appendix B). Predicated on the trial court's August 2, 1977, judgment, appellant filed a motion for the trial court to make additional findings of fact, conclusions of law and to amend its judgment accordingly, to-wit:

I. Requested finding of fact:

(a) The requirement of K. S. A. 1976 Supp. 40-3402 that a resident health care provider, such as respondent (Appellant), must carry medi-

cal malpractice insurance of not less than $100,000.00 per occurrence, subject to not less than $300,000.00 annual aggregate for all claims made during the policy period, to practice medicine within the State of Kansas has no rational connection with respondent's fitness, ability or capacity to practice medicine (Appendix C, p C2).

II. Requested conclusions of law:

(a) The State of Kansas may regulate the practice of medicine, but such regulations, requirements or conditions to be constitutional must have a rational connection to respondent's ability, capacity and fitness to practice medicine (Appendix C, pp C2-C3).

(b) K. S. A. 1976 Supp. 40-3402, K. S. A. 1976 Supp. 40-3404 and K. S. A. 1976 Supp. 40-3416 having no rational connection with respondent's ability, capacity or fitness to practice medicine are unconstitutional in contravention of the due process of law guaranty of the Fifth and Fourteenth Amendments of the United States Constitution and Sections One and Two of the Bill of Rights of the Kansas Constitution (Appendix C, p C3).

On August 16, 1977, the trial court denied appellant's motion to make additional findings of fact, conclusions of law and to amend its August 2, 1977, judgment (Appendix D). Thereafter, appeal was perfected to the Kansas Appellate Court. A joint motion was filed subsequently by all parties pursuant to Kansas Supreme Court Rule 8.02 and K. S. A. 1976 Supp. 20-3017 to transfer said appeal from the Kansas Appellate Court to the Kansas Supreme

Court. This joint motion was granted September 28, 1977, and said case transferred to the Kansas Supreme Court.

Thereafter, in compliance with Rule 6.02 of the Kansas Supreme Court (See Appendix I), appellant filed his brief elaborating the issues to be decided on appeal. Said issues were:

1. DID THE TRIAL COURT ERR BY ITS FAILURE TO RECOGNIZE, APPLY AND COMPLY WITH THE RATIONAL CONNECTION PRINCIPLE OR TEST AS PROMULGATED BY THE UNITED STATES SUPREME COURT AND RULE THAT K. S. A. 1976 SUPP. 40-3402, K. S. A. 1976 SUPP. 40-3404 AND K. S. A. 1976 SUPP. 40-3416, ARE UNCONSTITUTIONAL IN CONTRAVENTION OF THE DUE PROCESS GUARANTY OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTIONS ONE AND TWO OF THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION BECAUSE SAID STATUTES HAVE NO RATIONAL CONNECTION TO RESPONDENT'S FITNESS, CAPACITY, ABILITY OR COMPETENCY TO PRACTICE MEDICINE.[3]

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3. At pages 9 and 10 of appellant's brief to the Kansas Supreme Court the issues and constitutional principles upon which this appeal is predicated were explicitly and clearly defined, to-wit:

> Regardless of the state's and intervenor's attempt to bombard and smother the courts with legislative fact gathered from ex parte committee hearings, regardless of expressed noble purposes, regardless of the trial court's attempt to infer that ability is not definable, regardless of the trial court's failure to rule either that said statute is rationally connected or is not rationally connected to respondent's ability, the constitutional principle advocated by respondent at the trial level remains and it will not go away.
>
> The State cannot escape nor rebut the well established and well recognized principle of constitutional law that the due

(Continued on following page)

2. DID THE TRIAL COURT ERR BY ITS FAILURE TO RULE THAT ONE WHO IS QUALIFIED AND DULY LICENSED TO PRACTICE A PROFESSION HAS A CONSTITUTIONAL RIGHT TO DO SO, NOT A STATE PRIVILEGE, AND THAT ANY STATUTE WHICH LIMITS THAT RIGHT FOR REASONS NOT RATIONALLY CONNECTED TO ABILITY, CAPACITY, FITNESS OR COMPETENCY IS UNCONSTITUTIONAL, I. E., K. S. A. 1976 SUPP. 40-3402, K. S. A. 1976 SUPP. 40-3404 AND K. S. A. 1976 SUPP. 40-3416, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

3. DID THE TRIAL COURT ERR BY ITS FAILURE TO RULE THAT THE RIGHT TO WORK, SUCH AS A DULY LICENSED PHYSICIAN'S RIGHT TO PRACTICE MEDICINE, IS A FUNDAMENTAL PERSONAL LIBERTY OR RIGHT REQUIRING APPLICATION OF THE COMPELLING STATE INTEREST DOCTRINE OR TEST, NOT THE REASONABLE RELATIONSHIP TEST, TO ADJUDICATE WHETHER THE CLASSIFICATION OF K. S. A. 1976 SUPP. 40-3401(f) AND RESULTANT APPLICATION OF THAT CLASSIFICATION BY K. S. A. 1976

Footnote continued—

process clause of the Fourteenth Amendment limits the state's police power and guarantees to this respondent that he cannot be denied the right to practice medicine for reasons that have no rational connection with respondent's fitness or capacity as a physician. *Dent* v. *West Virginia*, (1889), 129 US 114, 32 L Ed 623, 9 S. Ct. 231; *Douglas* v. *Noble*, (1923), 261 US 165, 67 L Ed 590, 43 S. Ct. 303; *Schware* v. *Board of Bar Examiners*, (1957), 353 US 232, 1 L Ed 2d 796, 77 S. Ct. 752, 64 ALR2d 288; *Konigsberg* v. *State Bar of California*, (1957), 353 US 252, 1 L Ed 2d 810, 77 S. Ct. 722, reh den 354 US 927, 1 L Ed 2d 1441, 77 S. Ct. 1374; *Konigsberg* v. *State Bar of California*, (1961), 366 US 36, 6 L Ed 2d 105, 81 S. Ct. 997.

SUPP. 40-3402, K. S. A. 1976 SUPP. 40-3404 AND K. S. A. 1976 SUPP. 40-3416, CONTRAVENE AND EXCEED THE CONSTITUTIONAL LIMITATIONS PLACED ON STATE POLICE POWER BY THE EQUAL PROTECTION GUARANTY OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS ONE AND TWO OF THE BILL OF RIGHTS OF THE KANSAS CONSTITUTION.

4. DID THE TRIAL COURT IMPROPERLY APPLY THE REASONABLE RELATIONSHIP TEST AND ERR BY ITS SUBSEQUENT FAILURE TO FIND THAT THE CLASSIFICATION OF K. S. A. 1976 SUPP. 40-3401(f) AND RESULTANT APPLICATION OF THAT CLASSIFICATION BY K. S. A. 1976 SUPP. 40-3402, K. S. A. 1976 SUPP. 40-3404 AND K. S. A. 1976 SUPP. 40-3416 IS AN UNEQUAL, ARBITRARY, DISCRIMINATORY AND UNREASONABLE CLASSIFICATION CONSTITUTING AN UNCONSTITUTIONAL EXERCISE OF THE STATE'S POLICE POWER CONTRAVENING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On March 10, 1978, the Kansas Supreme Court affirmed the constitutionality of K. S. A. 1976 Supp. 40-3402 and rejected appellant's contention that the United States Supreme Court by its interpretation of the due process clause of the Fourteenth Amendment of the United States Constitution had promulgated a constitutional principle of law which clearly limited a state's power to interfere with an individual's liberty to pursue his profession and that Kansas had admittedly exceeded the maximum use of state police power permitted by requiring as a condition

to practice medicine that medical malpractice insurance be purchased and maintained (Appendix A, p A6).

At page six of the Kansas Supreme Court opinion (Appendix A, pp A7-A8) said principle relied upon and advocated by appellant as controlling and limiting state police power is recognized, to-wit:

> "Defendant argues the 'reasonable relation' test limits the restrictions on his right to practice medicine to those directly related to his fitness to practice medicine. In support of his position he cites *Konigsberg* v. *State Bar,* 366 U. S. 36, 6 L. Ed. 2d 105, 81 S. Ct. 997, reh. denied 368 U. S. 869, 7 L. Ed. 2d 69, 82 S. Ct. 21; *Konigsberg* v. *State Bar,* 353 U. S. 252, 1 L. Ed. 810, 77 S. Ct. 722, reh. denied 354 U. S. 927, 1 L. Ed. 2d 1441, 77 S. Ct. 1374; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752, 64 A. L. R. 2d 288; *Douglas* v. *Noble,* 261 U. S. 165, 67 L. Ed. 590, 43 S. Ct. 303; and *Dent* v. *West Virginia,* 129 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231. Those decisions all involved constitutional challenges to restrictions imposed by states upon a person's ability to obtain a professional license. . . ."

Thereafter, the Kansas Supreme Court expanded the permissible limits of state police power beyond the maximum mandated by this court and the due process clause of the Fourteenth Amendment of the United States Constitution. See Appendix A, p A8):

> ". . . While they appear to limit requirements for obtaining a license to professional fitness we do not read the cases as placing only professional fitness as the basis of the right of a state to regulate professions. Down through the years federal courts have recognized that states possess an inherent power to regulate certain businesses and professions for the good of society. This 'police power,' as the term has become known, gives states the right to act to protect and promote public health, safety, morals, peace, quiet, and law and order. (*Berman* v. *Parker,* 348 U. S. 26, 99 L. Ed. 27, 75 S. Ct. 98.) The foregoing discussion illustrates the scope of the power, but does not set its limits. (See, *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111, 55 L. Ed. 112, 116, 31 S. Ct. 186.)"

Therefore, based on the issues raised by appellant, on the Kansas Supreme Court judgment and opinion of March 10, 1978, and the numerous citations and discussion of federal authority therein, a substantial federal question was presented to the Kansas Supreme Court and decided.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents an important and substantial federal question under the due process clause of the Fourteenth Amendment of the United States Constitution to ascertain the degree and extent an individual may anticipate protection of his career and profession and be guaranteed the liberty to pursue his career and profession free from state police power and justification for its exercise, the general welfare of society. In summary, may the State of Kansas in the exercise of its police power deprive a physician, duly licensed and qualified to practice medicine within the State of Kansas, of his career, his constitutional right to work for a living and the liberty to pursue his profession for a reason that has no rational connection to his ability or competency to practice medicine?

Prior to March 10, 1978, appellant had assumed that this question had been answered and resolved by the United States Supreme Court and upon this court's de-

cisions and interpretation of the due process clause of the Fourteenth Amendment of the United States Constitution appellant relied, attacked the constitutionality of K. S. A. 1976 Supp. 40-3402 and defended his livelihood within the Kansas courts on the following principles of constitutional law promulgated by this court, to-wit:

1) A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause. *Dent* v. *West Virginia,* 129 US 114, 32 L Ed 623, 9 S. Ct. 231. Cf. *Slochower* v. *Board of Education,* 350 US 551, 100 L Ed 692, 76 S. Ct. 637; *Wieman* v. *Updegraff,* 344 US 183, 97 L. Ed 216, 73 S. Ct. 215. Re *Secombe* (US) 19 How 9, 13, 15 L Ed 565, 566; *Douglas* v. *Noble,* 261 US 165, 67 L Ed 590, 43 S. Ct. 303; *Schware* v. *Board of Bar Examiners,* 353 US 232, 1 L Ed 2d 796, 77 S. Ct. 752.

2) A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v. *Noble,* 261 US 165, 67 L Ed 590, 43 S. Ct. 303; *Cummings* v. *Missouri* (US) 4 Wall 277, 319, 320, 18 L Ed 356, 361, 362. Cf. *Nebbia* v. *New York,* 291 US 502, 78 L Ed 940, 54 S. Ct. 505, 89 ALR 1469; *Douglas* v. *Noble,* 261 US 165, 67 L Ed 590, 43 S. Ct. 303; *Schware* v. *Board of Bar Examiners,* 353 US 232, 1 L Ed 2d 796, 77 S. Ct. 752.

3) Even in the application of permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails

to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo* v. *Hopkins,* 118 US 356, 30 L Ed 220, 6 S. Ct. 1064; *Schware* v. *Board of Bar Examiners,* 353 US 232, 1 L Ed 796, 77 S. Ct. 752.

By semantics and interpretation, e. g., "this principle illustrates the scope, but not the limit of a state's power" (Appendix A, p A8), the Kansas Supreme Court abolished the above principles of constitutional law or at the very least expanded state power to regulate professions beyond requirements, conditions and qualifications rationally connected to competency, ability and capacity heretofore promulgated by this court to a principle of law that any regulation made by the state for the alleged general welfare of the state's citizens is constitutionally acceptable. By such interpretation and ruling the Kansas Supreme Court has bequeathed to the state legislature carte blanche power over the individual, his property, career and liberty to pursue his profession, with the ultimate consequence being the abolishment of an individual's liberty to pursue his profession free from the constant fear of state regulation and power to deprive one of his profession because there is a very small degree of proposed legislation that cannot be justified by state courts as being rationally related to the health and welfare of a state's citizens to, at least, some degree.

Appellant's interest in this federal question is substantial because under K. S. A. 1976 Supp. 40-3402 and K. S. A. 1976 Supp. 40-3416 and Kansas Court decisions upholding the constitutionality of said statutes, appellant is enjoined from pursuing his profession within the State of Kansas although duly licensed to do so. Appellant further believes and advocates that the rational connection principle or test promulgated in *Dent* v. *West Virginia,*

(1889) 129 US 114, 32 L Ed 623, 9 S Ct 231 and refined and reaffirmed thereafter is still the proper test to apply to ascertain whether a state has exercised its police power beyond the permissible constitutional limits and safeguards promulgated by this court in its interpretation of the due process clause of the Fourteenth Amendment of the United States Constitution.

In *Dent* v. *West Virginia*, (1889) 129 US 114, 32 L Ed 623, 9 S Ct 231, challenge was made of the constitutionality of a statute requiring practitioners of medicine to obtain a certificate from the State Board of Health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practiced medicine in the state continuously for a period of ten years prior to March 8, 1881; or that he has been found, upon examination by the Board, to be qualified, and which makes the practice of medicine without such certificate a misdemeanor.

The constitutional challenge to this statute was that it violated the Fourteenth Amendment to the United States Constitution by depriving defendant of the right to practice his profession without the required certificate. It was held constitutional because said law was intended to secure skill and learning in the profession of medicine.

In the course of reaching its decision and interpreting the Fourteenth Amendment of the United States Constitution, the United States Supreme Court created the rational connection principle or test thereby limiting the police power of the states regarding the medical profession.

At page 121, of *Dent* v. *West Virginia*, 129 US 114, 32 L Ed 623, 9 S Ct 231 (1889), the court stated:

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business,

or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. *The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors,* and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. *The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations, as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud.* As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instructions on the subjects, scientific and otherwise, with which such pursuits have to deal. *The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If*

they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." (Emphasis ours)

This constitutional principle was reaffirmed in *Douglas* v. *Noble*, 261 US 165, 67 L Ed 590, 43 S Ct 303. In this case, constitutional attack was made on a statute of the State of Washington which required that a person must be licensed before practicing dentistry and provided for a board of five practicing dentists to conduct the examination to determine whether a license should be granted. At page 592 of 67 L Ed the court stated:

"What authority the statute purports to confer upon the board is a question of construction. If it purported to confer arbitrary discretion to withhold a license, or to impose conditions which have no relation to applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the 14th Amendment. . ."

On May 6, 1957, in *Schware* v. *Board of Bar Examiners*, 353 US 232, 1 L Ed 2d 796, 77 S Ct 752 (1957), the United States Supreme Court applied this principle to the question of whether Rudolph Schware had been denied a license to practice law in New Mexico in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It was the New Mexico Board of Bar Examiners' position that Schware did not have the requisite moral character because of his use of

aliases, his former connection with subversive organizations and his record of arrests and thereby denied Schware's application to qualify for the practice of law. The United States Supreme Court held that the State of New Mexico had deprived Schware of due process in denying him the opportunity to qualify for the practice of law. In rendering this decision against New Mexico, this court reaffirmed the following constitutional principles:

1) A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause. *Dent* v. *West Virginia*, 129 US 114, 32 L Ed 623, 9 S. Ct. 231. Cf. *Slochower* v. *Board of Education*, 350 US 551, 100 L Ed 692, 76 S. Ct. 637; *Wieman* v. *Updegraff*, 344 US 183, 97 L Ed 216, 73 S. Ct. 215. And see Re *Secombe* (US) 19 How 9, 13, 15 L Ed 565, 566.

2) A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v. *Noble*, 261 US 165, 67 L Ed 590, 43 S. Ct. 303; *Cummings* v. *Missouri*, (US) 4 Wall 277, 319, 320, 18 L Ed 356, 361, 362. Cf. *Nebbia* v. *New York*, 291 US 502, 78 L Ed 940, 54 S. Ct. 505, 89 ALR 1469.

3) Even in the application of permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo* v. *Hopkins*, 118 US 356, 30 L Ed 220, 6 S. Ct. 1064.

The respondent, Byron Timothy Liggett, being qualified and licensed by the State of Kansas has a constitutional right to practice medicine within the State of Kansas without professional liability insurance. It is the right of his patients, not the State, to determine whether they wish to employ the services of an uninsured, but competent, qualified and licensed physician. See *Smith* v. *Texas*, 233 US 629, 58 L Ed 1129, S. C. Reporter's Ed 630-642, page 1129 of 58 L Ed:

> "The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves."

To rebut further, the Kansas Supreme Court's opinion that said principle merely sets minimum limitations, but not maximum limitations on the state's police power, normal interpretation and application of the English language adequately refutes such an argument as does the action of federal courts in recognizing this principle. See *Ostroff* v. *New Jersey Supreme Court*, (1976) 415 F. Supp. 326, in which a three-judge court recognized and applied this

rule or principle of law as a constitutional limitation on the state's police power. See page 328:

> "It is well settled:
>
> > '. . . that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests they have broad power to establish standards for licensing practitioner. . . * * * The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the court".'
>
> *Goldfarb* v. *Virginia State Bar*, 421 US 733, 792, 95 S. Ct. 2004, 2016, 44 L Ed 2d 572 (1975). More specifically, it is clear that the states have a substantial interest in requiring high standards of qualifications for those admitted to the practice of law. *In re Griffiths*, supra, 413 US at 725, 93 S. Ct. 2851; *Schware*, supra, 353 US at 239, 77 S. Ct. 752 at 756. *The only constitutional requirement is that the standards or qualifications. . . 'must have a rational connection with the applicant's fitness or capacity to practice law.'* It is clear to this court that the state has a rational basis for a requirement that applicants for admission to the state bar be graduates of a law school approved by the American Bar Association. *Potter* v. *New Jersey Supreme Court*, 403 F. Supp. 1037 (D. N. J. 1975) (three-judge court); *Rositer* v. *Law Committee, etc., et al.*, Civil No. C-4767 (D. Colo. Aug. 26, 1975); *Lombardi* v. *Tauro*, 470 F2d 798 (1st Cir. 1972), cert. denied, 412 US 919, 93 S. Ct. 2734, 37 L Ed 2d 145 (1972). While the basis for the require-

ment set forth in Rule 1:24-2(b) is not as compelling as the prerequisite referred to above, this Court will not second-guess the wisdom of the New Jersey Supreme Court in promulgating it. Under any of the descriptions of rationality heretofore used by courts, see generally, *Schilb* v. *Kuebel*, 404 US 357, 364, 92 S. Ct. 479, 30 L Ed 2d 502 (1971) and the cases cited therein, we cannot say that there is a clear lack of connection between the Rule and the plaintiff's fitness or capacity to practice law. . ."

To reiterate, in the instant case the state has conceded that the statute in issue requiring the purchase and maintenance of medical malpractice insurance as a condition to practice medicine in Kansas has no rational connection to appellant's ability, competency or capacity as a physician (Appendix A, pp A4-A5; Appendix G).

Therefore, the ultimate and substantial federal question presented to this court is whether the constitutional principles of law promulgated by this court and hereinabove set forth commencing with *Dent* v. *West Virginia*, (1889) 129 US 114, 32 L Ed 623, 9 S Ct 231 and reaffirmed many times thereafter and again in *Huffman* v. *Montana Supreme Court*, (1974) 419 US 955, 42 L Ed 2d 172, 95 S Ct 216, which definitively limit state police power concerning the professions and which protect the individual, his livelihood, his liberty to pursue his profession free from the constant fear of state police power are still valid, binding and conclusive on the states, or may Kansas, and therefore other states, now construe and interpret into oblivion the constitutional principles above set forth and the long established concept of individual freedom to work and to pursue a profession and career free from the fear of state interference except for reasons rationally connected to one's ability or capacity to pursue his profession?

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court a substantial and important federal question which requires plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A

KANSAS SUPREME COURT OPINION DATED MARCH 10, 1978

No. 49,446

STATE OF KANSAS, EX REL. CURT T. SCHNEIDER, ATTORNEY GENERAL,
Petitioner-Appellee,

KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Intervenors-Appellees,

v.

BYRON TIMOTHY LIGGETT, M.D.,
Respondent-Appellant.

SYLLABUS BY THE COURT

1. The power of the state to regulate and license professions is not limited to fitness to practice, but may also include requirements to protect and promote the public health, safety, morals, peace, quiet, and law and order.

2. The mandatory malpractice insurance provision of the Kansas Health Care Provider Insurance Availability Act (K.S.A. 1976 Supp. 40-3401, *et seq.* [now 1977 Supp.]) bears a reasonable relationship to the health and welfare of the citizens of this state and does not violate the due process clause of the state and federal Constitutions.

3. The provisions of the Kansas Health Care Provider Insurance Availability Act (K.S.A. 1976 Supp. 40-3401, *et seq.* [now 1977 Supp.]) bear a substantial relationship to the purpose of the legislation and do not violate the equal protection clause of the state and federal Constitu-

tions notwithstanding the fact they apply to both high risk and low risk practitioners but not to nurses and dentists.

Appeal from Barton district court, division No. 1; FREDERICK WOLESLAGEL, judge. Opinion filed March 10, 1978. Affirmed.

Michael S. Holland, of Holland & Rupe, of Russell, argued the cause and was on the brief for the appellant.

Donald R. Hoffman, assistant attorney general, argued the cause and *Curt T. Schneider,* attorney general, was with him on the brief for the petitioner-appellee.

Wayne T. Stratton, of Goodell, Cogswell, Stratton, Edmonds, Palmer & Wright, argued the cause and *Charles R. Hay,* of the same firm, and *Jerry M. Ward,* of Ward & Berscheidt, of Great Bend, were with him on the brief for the Kansas Hospital Association and the Kansas Medical Society, intervenors-appellees.

L. M. Cornish, Jr., of Glenn, Cornish & Leuenberger, of Topeka, argued the cause and was on the brief for the Kansas Health Care Provider Insurance Availability Plan, intervenor-appellee.

The opinion of the court was delivered by

OWSLEY, J.:

This is an appeal from an action wherein Dr. Byron Timothy Liggett was enjoined from practicing medicine until he obtained medical malpractice insurance as required by K.S.A. 1976 Supp. 40-3401, *et seq.* (now K.S.A. 1977 Supp. 40-3401, *et seq.*). The doctor challenges the constitutionality of the act on the grounds it denies him (1) substantive due process of the law, and (2) equal protection of the law. For the reasons set forth herein we find the act constitutional.

The Kansas Health Care Provider Insurance Availability Act was passed by the 1976 legislature as a partial response to increasing pressure brought upon Kansas health care providers because of the national medical malpractice crisis. The primary feature of the act is the requirement that all health care providers operating within the state must obtain professional malpractice liability insurance (40-3402) and pay a surcharge to the health care stabilization fund (40-3404). The law requires the provider to carry a basic policy of $100,000 per occurrence and an annual aggregate of $300,000 for all claims made during the period. The stabilization fund provides for the payment of claims in excess of policy limits. Included in the act is a provision requiring every health care insurer to participate in an apportionment plan whereby any health care provider may obtain liability insurance from the plan if insurance from a conventional source (40-3413) is not available.

The problem of obtaining and maintaining affordable malpractice insurance came before the legislature in 1971, 1973 and 1975. As a result, the legislature enacted a law in 1975 requiring all health care insurers to report their claims experience to the commissioner of insurance (K.S.A. 1975 Supp. 40-1126, *et seq.*). In 1976, however, the problem had grown to such proportions it received full legislative attention. A legislative interim committee was told in detail how insurance costs had skyrocketed on present policies, policies were unavailable for new doctors, insurers were beginning to withdraw from the medical malpractice field, and the availability of medical service in some Kansas communities was threatened. In response, the committee proposed twelve bills, including the act in the present controversy.

The original bill did not require mandatory insurance coverage, nor did it require payment of the surcharge.

These provisions were added by the legislature at the behest of Insurance Commissioner Fletcher Bell. The mandatory coverage provision, it was alleged, would provide for the financial stability of the insurance availability program and would assure all Kansans they would have a source of recovery for damages resulting from malpractice.

During the hearings on the bill Kansas dentists and nurses asked to be exempted from the proposed legislation. Both groups testified they were not experiencing the problems of malpractice associated with other health care providers and they could obtain adequate amounts of low cost insurance from their national associations. It was stated that many nurses worked on a part-time basis and the proposed mandatory insurance requirement, if applied to them, would economically force them out of practice.

Pharmacists, originally exempted from the act, asked to be included because they were beginning to experience malpractice and insurance availability problems similar to doctors and hospitals. The legislature made the insurance coverage mandatory and included pharmacists but exempted dentists and nurses.

The main thrust of Dr. Liggett's attack on the act is that it requires him to obtain liability insurance before he may engage in the practice of medicine. He argues he was already qualified and licensed to practice medicine prior to the time the law went into effect; therefore, he has a vested right to practice medicine and the state cannot now impose any additional requirements which might take away that right. He further argues that any requirement affecting the right to practice a profession must be directly related to a person's ability to practice that profession before the condition is constitutionally valid. He also claims, and the state candidly admits, that the presence or absence of insurance does not affect his compe-

tence as a physician; it affects only the ability to satisfy a judgment if he should successfully be sued for negligence or malpractice.

In all fairness to Dr. Liggett it should be noted that no one has alleged he is incompetent or unfit to practice medicine, and to our knowledge he has not been sued for malpractice, nor have any complaints been lodged against him. He simply refuses to purchase the required insurance or to pay the surcharge.

We live in a dynamic society and the law must change responsively to the needs of the people. No person has a vested right in any rule of law entitling him to insist it shall remain unchanged for his benefit. (*New York Central R.R. Co.* v. *White*, 243 U.S. 188, 61 L. Ed. 667, 37 S. Ct. 247.) Events transpiring after the passage of a law may require changes and place a citizen in a position different from that which he occupied prior to the change. (*Pinnick* v. *Cleary*, 360 Mass. 1, 271 N.E. 2d 592 [1971], 42 A.L.R. 3d 194.) The Fourteenth Amendment to the United States Constitution and Section 18 of the Kansas Bill of Rights do not constitutionally prohibit changes in the law which affect a person's rights as they existed at common law. In *Williams* v. *City of Wichita*, 190 Kan. 317, 374 P. 2d 578, we said:

> ". . . [T]he great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances. That the legislature may change the principle of the common law and abrogate decisions made thereunder when in its opinion it is necessary to the public interest is well settled. . . ." (pp. 331-32.)

In *Manzanares* v. *Bell*, 214 Kan. 589, 522 P. 2d 1291, considering the mandatory no-fault insurance law for Kansas motorists, this court stated:

"While Section 18 of the Bill of Rights provides a broad field for the protection of persons, property and reputation, the vested rights contained therein are subject to change by legislative power, where the change is reasonably necessary in the public interest to promote the general welfare of the people of the state. We have never held one to have a vested right in the common-law rules governing negligence actions so as to preclude substituting a viable statutory remedy for common law causes of action. . . ." (p. 599.)

Defendant's constitutional rights are not violated merely because the statutes require him to do something which was not required of him when he first obtained his license to practice medicine.

We turn to the due process and equal protection arguments raised by defendant. In order to properly resolve these issues it is necessary to understand the distinction between these two constitutional concepts. In *Ross* v. *Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437, the court explained:

". . . 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. . . ." (p. 609.)

The standard of review in a due process case has fluctuated in response to society's changing attitudes concerning the proper role of the judiciary in the examination of social and economic regulations imposed pursuant to the state's police power. In the past courts often struck down laws with which they disagreed on the basis that due process was violated. (See, *e.g.*, *Tyson & Brother* v. *Banton*, 273 U.S. 418, 71 L. Ed. 718, 47 S. Ct. 426; *Adkins* v. *Children's Hospital*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394; *Coppage* v. *Kansas*, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240; *Adair* v. *United States*, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277; *Lochner* v. *New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539.) This practice fell into disrepute, however, beginning with the case of *Nebbia* v. *New York*, 291 U.S. 502, 78 L. Ed. 940, 54 S. Ct. 505. There the court retreated from its previous attitude and declared the test for due process to be whether the legislative means selected had a real and substantial relation to the objective sought. The rule has been restated in terms of whether the regulation is reasonable in relation to its subject and is adopted in the interest of the community. (*West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A.L.R. 1330.) Courts can no longer sit as a "super legislature" and throw out laws they feel may be unwise, improvident or inappropriate. (*Ferguson* v. *Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028, 95 A.L.R. 2d 1347; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461.) That view remains valid today. See, *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U.S. 156, 38 L. Ed. 2d 379, 94 S. Ct. 407; *Dean* v. *Gadsden Times Publishing Corp.*, 412 U.S. 543, 37 L. Ed. 2d 137, 93 S. Ct. 2264; *Griswold* v. *Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678.)

Defendant argues the "reasonable relation" test limits the restrictions on his right to practice medicine to those directly related to his fitness to practice medicine. In support of his position he cites *Konigsberg* v. *State Bar*, 366 U.S. 36, 6 L. Ed. 2d 105, 81 S. Ct. 997, reh. denied 368 U.S. 869, 7 L. Ed. 2d 69, 82 S. Ct. 21; *Konigsberg* v. *State Bar*, 353 U.S. 252, 1 I. Ed. 2d 810, 77 S. Ct. 722, reh. denied 354 U.S. 927, 1 L. Ed. 2d 1441, 77 S. Ct. 1374; *Schware*

v. *Board of Bar Examiners*, 353 U.S. 232, 1 L. Ed. 2d 796, 77 S. Ct. 752, 64 A.L.R. 2d 288; *Douglas* v. *Noble*, 261 U.S. 165, 67 L. Ed. 590, 43 S. Ct. 303; and *Dent* v. *West Virginia*, 129 U.S. 114, 32 L. Ed. 623, 9 S. Ct. 231. Those decisions all involved constitutional challenges to restrictions imposed by states upon a person's ability to obtain a professional license. While they appear to limit requirements for obtaining a license to professional fitness we do not read the cases as placing only professional fitness as the basis of the right of a state to regulate professions. Down through the years federal courts have recognized that states possess an inherent power to regulate certain businesses and professions for the good of society. This "police power," as the term has become known, gives states the right to act to protect and promote public health, safety. morals, peace, quiet, and law and order. (*Berman* v. *Parker*, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98.) The foregoing discussion illustrates the scope of the power, but does not set its limits. (See, *Noble State Bank* v. *Haskell*, 219 U.S. 104, 111, 55 L. Ed. 112, 116, 31 S. Ct. 186.)

In *Manzanares* v. *Bell*, supra, this court recognized that the police power includes not only the right to prevent accident and injury to members of the public but the right to provide for them a method of compensation for bodily injury arising out of an accident. In support of its position the court cited *Pinnick* v. *Cleary*, supra. Upholding the Massachusetts no-fault insurance law, that court stated:

> "... Any doubts as to the power of the Legislature to require the citizen, for the good of the public as a whole, to take measures for his own benefit have long since been settled in a series of cases sustaining such statutes. The fact that in many of these cases this feature of the act was not even attacked indicates the lack of gravity of the objection. . . ." (p. 24.)

The power to require physicians and other health care providers to obtain licenses before practicing medicine is undisputed. (See, *Kansas State Board of Healing Arts* v. *Seasholtz*, 210 Kan. 694, 504 P. 2d 576; *Kansas State Board of Healing Arts* v. *Foote*, 200 Kan. 447, 436 P. 2d 828, 28 A.L.R. 3d 472; *State, ex rel.*, v. *Gleason*, 148 Kan. 1, 79 P. 2d 911; *State, ex rel.*, v. *Cooper*, 147 Kan. 710, 78 P. 2d 884; *Meffert* v. *Medical Board*, 66 Kan. 710, 72 Pac. 247, aff'd 195 U.S. 625, 49 L. Ed. 350, 25 S. Ct. 790; *State* v. *Wilcox*, 64 Kan. 789, 68 Pac. 634; *State* v. *Creditor*, 44 Kan. 565, 24 Pac. 346.) Requiring liability insurance in order to obtain or keep such a license is not unlike requirements imposed upon abstracters (K.S.A. 1977 Supp. 58-2802), pesticide businesses (K.S.A. 1977 Supp. 2-2448), county ambulance services (K.S.A. 19-261), securities dealers (K.S.A. 17-1254), warehousemen (K.S.A. 34-229 and 34-236), livestock markets (K.S.A. 47-1002), or public carriers (K.S.A. 1977 Supp. 66-1,128 and 66-1314). The attacks made upon the mandatory insurance requirement for public carriers have withstood the same attack now made by defendant. (See, *Flowers* v. *Fidelity & Casualty Co.*, 156 F. 2d 586 [10th Cir. 1946]; *Continental Baking Co.* v. *Woodring*, 55 F. 2d 347 [D. Kan. 1931], aff'd 286 U.S. 352, 76 L. Ed. 1155, 52 S. Ct. 595; *Louis* v. *Boynton*, 53 F. 2d 471 [D. Kan. 1931].)

In balancing relevant and conflicting factors, as we are required to do (*Bartkus* v. *Illinois*, 359 U.S. 121, 128, 3 L. Ed. 2d 684, 689, 79 S. Ct. 676, reh. denied 360 U.S. 907, 3 L. Ed. 2d 1258, 79 S. Ct. 1283), we hold that the mandatory provisions of K.S.A. 1977 Supp. 40-3401, *et seq.*, do not violate the due process clause. Mandatory malpractice insurance bears a rational relationship to the health and welfare of the citizens of this state by not only providing protection to patients who may be injured as a result of medical malpractice, but by assuring that

there continues to exist in the state an adequate supply of health care providers. (See, *Jones* v. *State Board of Medicine*, 97 Idaho 859, 555 P. 2d 399 [1976], cert. denied 431 U.S. 914, 53 L. Ed. 2d 223, 97 S. Ct. 2173; *Cf., Pollock* v. *Methodist Hospital*, 392 F. Supp. 393 [E.D. La. 1975].)

Our next concern is whether the statute offends the equal protection clause. When considering this question we must first determine the proper test. Traditionally, the yardstick for measuring equal protection arguments has been the "reasonable basis" test. The standard was set forth in *McGowan* v. *Maryland*, 366 U.S. 420, 425-26, 6 L. Ed. 2d 393, 81 S. Ct. 1101:

> ". . . The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . ."

In *Dandridge* v. *Williams*, 397 U.S. 471, 25 L. Ed. 2d 491, 90 S. Ct. 1153, reh. denied 398 U.S. 914, 26 L. Ed. 2d 80, 90 S. Ct. 1684, it was stated:

> ". . . If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. . . ." (p. 485.)

A statute comes before the court cloaked in a presumption of constitutionality and it is the duty of the one attacking the statute to sustain the burden of proof. (*Henry* v. *Bauder*, 213 Kan. 751, 753, 518 P. 2d 362; *Tri-State Hotel Co.* v. *Londerholm*, 195 Kan. 748, 760, 408 P. 2d

877; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L. Ed. 369, 31 S. Ct. 337.)

A more stringent test has emerged, however, in cases involving "suspect classifications" or "fundamental interests." Here the courts peel away the protective presumption of constitutionality and adopt an attitude of active and critical analysis, subjecting the classification to strict scrutiny. The burden of proof to justify the classification falls upon the state. (See, *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322.) This test has been used to strike down classifications based on race (*Loving* v. *Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817); sex (*Reed* v. *Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251); ethnic background (*Katzenbach* v. *Morgan*, 384 U.S. 641, 16 L. Ed. 2d 828, 86 S. Ct. 1717); residency (*Shapiro* v. *Thompson*, supra); alienage (*Sugarman* v. *Dougall*, 413 U.S. 634, 37 L. Ed. 2d 853, 93 S. Ct. 2842; *Graham* v. *Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848); and infringements of fundamental rights, such as the right to travel freely (*Dunn* v. *Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1659) or to practice one's religion (*Sherbert* v. *Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790).

The "compelling state interest" or "strict scrutiny" test requires the court to consider the nature of the rights affected by the legislation, the classification established, and the governmental interest necessitating the classification. (*Manzanares* v. *Bell*, supra at 600; *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076; *Kramer* v. *Union School District*, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S. Ct. 1886.) In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278, reh. denied 411 U.S. 959, 36 L. Ed. 2d 418, 93 S. Ct. 1919, it was held that a right to an education did not be-

come a fundamental interest treated under the compelling state interest test merely because of the societal significance of education. Instead the court held that the determination of a fundamental interest focuses upon whether the right asserted is explicitly or implicitly guaranteed by the Constitution. That method of analysis must be applied here.

Traditionally, the "rational relationship" test is applied in cases involving occupational licensing, including those concerning the medical profession. (See, *Williamson* v. *Lee Optical Co.*, supra.) The cases recognize there is no "fundamental interest" involved in the practice of medicine (*Shaw* v. *Hospital Authority of Cobb County*, 507 F. 2d 625 [5th Cir. 1975]; *D'Amico* v. *Board of Medical Examiners*, 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P. 2d 10 [1974]; *Jones* v. *State Board of Medicine*, supra); or in any other profession (*Naismith Dental Corp.* v. *Board of Dental Examiners*, 68 Cal. App. 3d 253, 137 Cal. Rptr. 133 [1977] [dentistry]; *Hawkins* v. *Moss*, 503 F. 2d 1171 [4th Cir. 1974] [law]; *Lombardi* v. *Tauro*, 470 F. 2d 798 [1st Cir. 1972] [law]; *Ostroff* v. *New Jersey Supreme Court*, 415 F. Supp. 326 [D. N.J. 1976] [law]; *Watson* v. *Cronin*, 384 F. Supp. 652 [D. Colo. 1974] [news reporting].) The case of *In re Griffiths*, 413 U.S. 717, 37 L. Ed. 2d 910, 93 S. Ct. 2851, cited by defendant, is inapposite because it involved the suspect classification of alienage for its turning point.

The practice of medicine is not a fundamental interest under the Constitution; therefore, defendant's equal protection argument must be gauged by the traditional "rational relationship" test. This does not mean we denigrate the importance of defendant's profession or any other recognized profession or business; we simply cannot perceive any implicit or explicit guarantee in the state or federal Constitutions for the right to practice medicine. (See, *Lindsey* v. *Normet*, 405 U.S. 56, 74, 31 L. Ed. 2d 36, 50, 92 S. Ct. 862.)

Defendant first challenges the statutes because high risk physicians (surgeons, anesthesiologists, etc.) are treated the same as low risk practitioners (family doctors, general practitioners, etc.). He also challenges the statutes because they do not apply to dentists, nurses, lawyers and other professionals.

In *Henry* v. *Bauder*, supra at 753, we stated:

> ". . . A classification employed in the exercise of police power cannot be made arbitrarily. Any distinctions inherent in a particular classification must furnish a proper and reasonable basis for such a classification. The concept of equality of all citizens under the law is, of course, basic to our free society. We have stated that classifications may not be created arbitrarily, discriminatorily or unreasonably, or the principle of equality would be violated. There must be some difference in character, condition, or situation, to justify distinction, and this difference must bear a just and proper relation to the proposed classification and regulation; otherwise, the classification is forced and unreal, and greater burdens are, in fact, imposed on some than on others of the same desert. (*The State* v. *Heitman*, 105 Kan. 139, 181 Pac. 630.)"

(See also, *Manzanares* v. *Bell*, supra; *Reed* v. *Reed*, supra; *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415, 64 L. Ed. 989, 991, 40 S. Ct. 560, 562.)

Establishment of classifications with mathematic precision is not required. In a dissenting opinion in *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41, 72 L. Ed. 770, 48 S. Ct. 423, Mr. Justice Holmes stated:

> ". . . [W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature

must be accepted unless we can say that it is very wide of any reasonable mark."

By the same token a statute is not infirm because it does not go as far as it might have gone. (*Schilb* v. *Kuebel,* 404 U.S. 357, 364, 30 L. Ed. 2d 502, 511, 92 S. Ct. 479, reh. denied 405 U.S. 948, 30 L. Ed. 2d 818, 92 S. Ct. 930; *Katzenbach* v. *Morgan,* supra at 657; *Semler* v. *Dental Examiners,* 294 U.S. 608, 610, 79 L. Ed. 1086, 1089, 55 S. Ct. 570.)

In *Manzanares* v. *Bell,* supra, this court stated:

"It should be noted that this court is not made the superintendent of legislative activity under principles of equal protection. (*Griswold* v. *Connecticut,* 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678.) Equal protection principles do not restrain the normal exercise of governmental power, but only abuse in the exertion of such authority. The principle of equal protection is not offended against simply because the exercise of the power may result in some inequality. (*Louisville & Nashville R.R.* v. *Melton,* 218 U.S. 36, 54 L. Ed. 921, 30 S. Ct. 676.) There is no precise application of the rule of reasonableness in classifying, and equality permits many practical inequalities. There need not be an exact exclusion or inclusion of persons and things. (*Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 42 L. Ed. 1037, 18 S. Ct. 594.) The state enjoys a wide range of discretion in distinguishing, selecting, and classifying, and it is sufficient if a classification is practical and not palpably arbitrary. (*Orient Insurance Company* v. *Daggs,* 172 U.S. 557, 43 L. Ed. 552, 19 S. Ct. 281; *Shelton* v. *Phalen,* 214 Kan. 54, 519 P. 2d 754; *State* v. *Weathers,* supra; *Tri-State Hotel Co.* v. *Londerholm,* 195 Kan. 748, 408 P. 2d 877; *Martin* v. *Davis,* 187 Kan. 473, 357 P. 2d 782, app. dismissed 368 U.S. 25, 7 L. Ed. 2d 5, 82 S. Ct. 1; *Board of County Comm'rs* v. *Robb,* 166 Kan. 122, 199 P. 2d 530.) '. . . To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations . . . What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to . . . judicial review. . . .' (*Metropolis Theatre Co.* v. *Chicago,* 228 U.S. 61, 69, 70, 57 L. Ed. 730, 734, 33 S. Ct. 441, 443.)

. . .

"In the areas of economic and social legislation, a statutory plan does not violate the equal protection clause merely because the classifications contained therein are imperfect. (*Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 39 L. Ed. 2d 797, 94 S. Ct. 1536, 42 L.W. 4475; *Jefferson* v. *Hackney,* 406 U.S. 535, 32 L. Ed. 2d 285, 92 S. Ct. 1724.) Nor does the equal protection clause require a state to 'choose between attacking every aspect of a problem or not attacking the problem at all . . .' (*Dandridge* v. *Williams,* 397 U.S. 471, 487, 25 L. Ed. 2d 491, 503, 90 S. Ct. 1153, 1162.) . . ." (pp. 612-15.)

We are of the opinion that equal protection is not offended by including high risk and low risk practitioners together. The legislature found the medical health care crisis was affecting all health care providers in this state although the primary impact fell on specialists in high risk areas. Even new doctors practicing in low risk fields were beginning to find it difficult, if not impossible, to obtain coverage. In addition, evidence showed that low risk practitioners needed high risk specialists in order to provide comprehensive care for their patients. Were insurance

coverage unavailable for the specialists in high risk fields, the evidence indicates these professionals would either leave the state or would soon quit the practice, causing a general decline in the overall quality of health care available in this state.

The insurance commissioner testified before legislative committees that the insurance pool had to include low risk providers as well as high risk practitioners or the entire program would be actuarially unsound. We therefore find the purposes of the act and the classifications of physicians within the act were related as a means to accomplish those purposes.

Likewise, there was no denial of equal protection because the act applied to some health care providers but not to others. The record indicates that dentists and nurses asked to be excluded from the act because they were not experiencing the same malpractice problems as doctors and insurance was readily available to them through national associations. Distinguishing between one group of medical professionals and another has never been held to violate the equal protection clause if the differing treatment has a fair and substantial relationship to the purpose of the legislation. (*Shaw* v. *Hospital Authority of Cobb County*, supra at 628; *Gleason* v. *Carlson*, 92 F. Supp. 280, 285 [D. Kan. 1948]; *Naismith Dental Corp.* v. *Board of Dental Examiners*, supra at 262; *McCarty* v. *Goldstein*, 151 Colo. 154, 376 P. 2d 691 [1962]. *Cf., Prendergast* v. *Nelson*, 199 Neb. 97, 256 N.W. 2d 657, 669 [1977].) The fact nurses and dentists were not affected by the malpractice crisis in the same way as other health care providers is sufficient on its face to demonstrate that they are a different class of persons and can be so treated by the legislature without offending the equal protection clause.

The judgment of the district court is affirmed.

HOLMES, J., dissenting.

APPENDIX B

BARTON COUNTY DISTRICT COURT, JOURNAL ENTRY OF JUDGMENT DATED AUGUST 2, 1977

IN THE DISTRICT COURT OF
BARTON COUNTY, KANSAS

No. 27,154

STATE OF KANSAS, ex rel., CURT T. SCHNEIDER,
Attorney General,
Petitioner,

KANSAS MEDICAL SOCIETY, KANSAS HOSPITAL ASSOCIATION, KANSAS HEALTH CARE PROVIDERS INSURANCE AVAILABILITY PLAN,
Intervenors,

vs.

BYRON TIMOTHY LIGGETT, M.D.,
Respondent.

JOURNAL ENTRY OF JUDGMENT

In this action the Plaintiff seeks to enjoin the Defendant from the practice of medicine in this state unless he complies with K.S.A. 1976 Supp. 40-3402 and K.S.A. 1976 Supp. 40-3404.

There are many underlying factual findings which give the foundation for what might properly be termed ultimate findings of fact. The ultimate findings are made in separate numbered paragraphs following this paragraph. The underlying factual findings that I make presently

appear on the numbered paragraphs of Appendix I attached to the brief as filed in this case by the Plaintiff. By reference I hereby make the numbered paragraphs of that appendix a part of this Journal Entry, and I designate them to be underlying factual findings. My ultimate findings are as follows:

FINDINGS OF FACT

1. The action is properly brought by the Plaintiff on relation of the Attorney General of this state.

2. When this action was filed, the respondent practiced medicine in Barton County, and he continues to do so. He is licensed by the Kansas State Board of Healing Arts to practice medicine and surgery. Accordingly, he is a "health care provider" as defined by K.S.A. 1976 Supp. 40-3401(f).

3. Respondent has never complied with the statutes first mentioned. They provide that, as a condition for the right to practice medicine in this state, the practitioner shall carry professional liability insurance and pay a premium surcharge to the Health Care Stabilization Fund established by K.S.A. 1976 Supp. 40-3403.

4. The respondent alleges that such requirements are unconstitutional on grounds that they deny to him his due process and equal protection rights under the United States and Kansas Constitution.

5. The respondent admits that should the court find that such requirements are constitutional the State is entitled to an injunction pursuant to K.S.A. 1976 Supp. 40-3416 prohibiting him from practicing in this state until he complies with such requirements.

6. The mandatory insurance and surcharge requirements are contained in the Kansas Health Care Provider

Insurance Availability Act, K.S.A. 1976 Supp. 40-3401 to 40-3419 inclusive, which was enacted by the 1976 Legislature and became effective on July 1, 1976.

7. The legislation was not passed until after various legislative committees had heard extensive testimony about the nature and severity of problems faced by certain classes of health care professionals and institutions in this state with the availability and cost of liability insurance.

8. Legislative committees were told by numerous witnesses that the problem, left unresolved, could have a substantial adverse effect on the quality of health care available to the Kansas public.

9. The legislature, through its various committees, was also informed that the twin problems of cost and availability of liability insurance did not afflict dentists or nurses in this state.

10. From the numerous facts presented, the legislature could have reasonably concluded that substantial problems as to the cost and availability of liability insurance for certain classes of health care providers and institutions existed in this state, that it could be expected to have an adverse effect on the quality of health care available to Kansas citizens, and that the act in question, along with eleven other bills that were also enacted, could reasonably be expected to alleviate or substantially reduce the severity of the problem.

CONCLUSIONS OF LAW

1. The statute in question comes before the Court with a presumption of constitutionality. The "compelling interest" doctrine is not involved in this litigation because the case is not concerned with "suspect classifications," nor is the right to practice medicine a "fundamental right."

2. In determining whether a legislative scheme transgresses upon the guarantee of due process of the law, the applicable test is whether the legislation bears a reasonable relationship to a permissible legislative objective.

3. Pursuant to its police powers, the State may lawfully enact legislation designed to promote the health, safety and welfare of the public.

4. Courts do not have arbitrary authority to set aside legislation under principles of equal protection. Equal protection principles do not restrain the normal exercise of governmental power, but only abuse of such authority. The principle of equal protection is not offended simply because the exercise of the power may result in some inequality. The test utilized in determining whether a legislative enactment violates equal protection principles is whether the classification bears a rational relationship to the purpose of the legislation. There is no precise application of the rule of reason in classifying, and equality in law permits some inequalities. There need not be an exact exclusion or inclusion of persons and things. The State enjoys a wide range of discretion in distinguishing, selecting, classifying, and it is sufficient if a classification is practical and not palpably arbitrary. The problems of government are practical ones and may justify, if they do not require, uncomfortable accommodations. Simple imperfections of government are not subject to judicial review.

A brief discussion of recent cases may be helpful to the parties and their attorneys in understanding the Conclusions of Law. I will limit myself to *Manzanares* v *Bell*, 214 Kansas 589 (1974) (it will be referred to as the Kansas case): *Jones* v *State Board of Medicine*, 97 Idaho 859 (1976) (this will be referred to as the Idaho case: and *McGaffey* v *Hall*, Supreme Court #SC-

94-MR (1977), which was combined with another case for decision and will be referred to as the Kentucky case.

The Kansas case concerned the right of travel on the highways. This right has generally been considered to be as substantial as the right to work, but it was not recognized as being so fundamental a right that the legislature could not condition the right. The Court, in fact, considered that the term "privilege" was more appropriate than the term "right." The Kansas Court, in earlier cases, has considered the practice of medicine as not being a right, but as being a privilege.

The Kansas case additionally dwelt upon unequal classification of motorcyclists as compared to automobile drivers. The classification complained of by the respondent in this case is no more arbitrary than the classification found to be valid in the Kansas case.

In the Idaho case, the right to practice medicine was involved in a way almost identical to the way it is involved in this case. The requirement of insurance, and even the amount of insurance required, as conditions to continuing to practice were identical. In the Idaho case either the legislature or the attorneys presenting the case failed to do the homework that has been done by the Kansas legislature and its committees and by the attorneys in this case. Accordingly, the case was remanded to the trial court so that a determination could be made as to whether or not there really was a problem in the state which would support the legislation as being needed for the welfare of the people of that state. The legal principles announced in that case, I think, are consistent with the conclusions of law that I have entered. The difference is that, in this case, the legislature and the attorneys did their homework. The underlying findings of fact I have made, for example, are replete with evidence that insur-

ance premiums for medical practitioners are accelerating at such a rapid pace that it was reasonable to conclude that both experienced and brand-new practitioners would in significant numbers either discontinue practice or find other states in which to practice. As another example, there was testimony that doctors were actually practicing "defensive medicine." One who so testified was Dr. David Robinson, Acting Executive Vice-Chancellor of the University of Kansas Medical School. Accordingly, such testimony should not have been, and apparently was not, taken lightly. As I understand "defensive medicine," it means that one who practices it tends to center more on old methods that may not cure but tend not to kill, rather than on newer methods that may involve some risk to life but which assure a higher percentage of cure.

The Kentucky case again involves a statute similar to the Kansas enactments. The Kentucky court found their statute to be unconstitutional because of a defect in the title of the act as compared to the substance of the act and because the act called for unlawful commitment of tax money to be raised by future legislatures.

This is not to say that the Kentucky court indicated it had any sympathy with this type of legislation. The Kentucky court, in fact, even appeared to take a dim view of the decision of the Idaho court on general principles. The Kentucky court likewise appeared to take a dim view of the insurance industry as it said that industry "is becoming less willing to insure against malpractice and is charging prohibitive rates when it does."

The Kentucky court, in fact, appeared to view its legislative enactment as being designed solely to provide money to people who had malpractice cases, and the court took the position that no general welfare of its inhabitants was really involved. The case would indicate that

the Kentucky legislature did not do the homework that the Kansas legislature did, but in any event, the Kansas legislature centered upon the need for adequate medical services as much at least as it did upon reparation for acts of malpractice. The Kentucky court said, for example, "We have held the compulsory insurance program invalid because there is neither a showing nor anything else of which we may take judicial notice to indicate how it might tend to alleviate the scarcity and high cost of malpractice insurance. It is entirely possible that this deficiency can be remedied."

Even if the Kentucky case stands for more than it seems to me to stand for, the Idaho decision appears to me to be far more consonant with the philosophy of the Kansas court as exemplified in *Manzanares* and earlier Kansas cases which touch upon the right to practice a profession being a privilege rather than an actual right.

The respondent is hereby enjoined from the practice of medicine until such time as he complies with the statutes first mentioned in this opinion.

/s/ Frederick Woleslagel
Frederick Woleslagel
District Judge, Division I

APPENDIX C

APPELLANT'S MOTION FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

Case No. 27,154

STATE OF KANSAS, ex rel. CURT T. SCHNEIDER, Attorney General,

Petitioner,

vs.

BYRON TIMOTHY LIGGETT, M. D.,

Respondent,

KANSAS HOSPITAL ASSOCIATION, KANSAS MEDICAL SOCIETY, KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,

Intervenors.

MOTION FOR ADDITIONAL FINDINGS OF FACT ANR CONCLUSIONS OF LAW.

Comes now the respondent, Byron Timothy Liggett, M. D., and moves the Court pursuant to K. S. A. 60-252(b) to make additional findings of fact and conclusions of law and to amend its judgment accordingly pursuant to K. S. A. 60-259, and in support of said motion states and alleges, to-wit:

1. Said motion to make additional findings of fact and conclusions of law is predicated upon K. S. A. 60-252(b).

2. The portion of respondent's motion to amend the judgment entered by the above Court on August 2, 1977, is predicated upon K. S. A. 60-252(b) and 60-259(f).

3. That the respondent requests that the Court make the following additional findings of fact, to-wit:

(a) The requirement of K. S. A. 1976 Supp. 40-3402 that a resident health care provider, such as respondent, must carry medical malpractice insurance of not less than $100,000.00 per occurrence, subject to not less than $300,000.00 annual aggregate for all claims made during the policy period, to practice medicine within the State of Kansas has no rational connection with respondent's fitness, ability or capacity to practice medicine.

(b) The requirement of K. S. A. 1976 Supp. 40-3404, i. e., levy and payment of a premium surcharge, to practice medicine within the State of Kansas has no rational connection with respondent's fitness, ability or capacity to practice medicine.

(c) The authority granted to the Attorney General or a County Attorney by K. S. A. 1976 Supp. 40-3416 to enjoin a duly licensed and qualified health care provider from the practice of medicine for failure to comply with the requirements of K. S. A. 1976 Supp. 40-3402 has no rational connection with respondent's fitness, ability or capacity to practice medicine.

4. The respondent requests that the Court make the following conclusions of law, to-wit:

(a) The State of Kansas may regulate the practice of medicine, but such regulations, requirements or conditions to be constitutional must have a rational connection to respondent's ability, capacity and fitness to practice medicine.

(b) K. S. A. 1976 Supp. 40-3402, K. S. A. 1976 Supp. 40-3404 and K. S. A. 1976 Supp. 40-3416, having no rational connection to respondent's ability, capacity or fitness to practice medicine are unconstitutional in contravention of the due process of law guaranty of the Fifth and Fourteenth Amendments of the United States Constitution and Sections One and Two of the Bill of Rights of the Kansas Constitution.

(c) The right to work for a living, to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference is a fundamental right and liberty guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

5. Predicated upon the above findings of fact and conclusions of law, respondent requests that the Court amend its judgment and find that K. S. A. 1976 Supp. 40-3402 and K. S. A. 1976 Supp. 40-3416 deny and deprive respondent of due process of law in violation of his constitutional rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution, and that said statutes are thereby null and void.

6. Pursuant to Rule 133, this is to respectfully request oral argument on the above motions.

WHEREFORE, respondent asks and prays that his motions above set forth be granted and sustained and that the Court amend its judgment to find that K. S. A. 1976 Supp. 40-3402 and K. S. A. 1976 Supp. 40-3416 are unconstitutional, null and void in violation of the Fifth and Fourteenth Amendments of the United States Constitution, i. e., the due process clause thereof as having

no rational connection to respondent's ability, capacity or fitness to practice medicine.

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Phone 913-483-5332
Attorneys for Respondent, Byron Timothy Liggett, M. D.

CERTIFICATE OF SERVICE

I, Michael S. Holland of the firm of Holland & Rupe, Attorneys at Law, Russell, Kansas, do hereby certify that I mailed a true and correct copy of the above and foregoing MOTION FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW, by depositing same in the United States mail, postage prepaid and properly addressed to each of the following attorneys of record, to-wit: Mr. Wayne T. Stratton of the firm of Goodell, Casey, Briman & Cogswell, 215 East 8th Street, Topeka, Kansas 66603, attorneys for intervenors, Kansas Hospital Association & Kansas Medical Society; Mr. Jerry M. Ward of the firm of Ward & Berscheidt, 1324 Kansas Avenue, Great Bend, Kansas 67530, attorneys for intervenors, Kansas Hospital Association & Kansas Medical Society; Mr. L. M. Cornish, Jr. of the firm of Glenn, Cornish & Leuenberger, 610 First National Tower, Topeka, Kansas 66603, attorneys for intervenor, Kansas Health Care Provider Insurance Availability Plan, and to Mr. Kenneth P. Stewart of the firm of Boyer, Donaldson & Stewart, 1030 First National Bank Building, Wichita, Kansas 67202, attorneys for applicant intervenor, Wesley Medical Center, and to Mr. Donald

R. Hoffman, Assistant Attorney General, First Floor, State Capitol, Topeka, Kansas 66612, attorney for petitioner, this 3rd day of August, 1977, and the Original mailed to Ms. Irene Horner, Clerk of the District Court of Barton County, Kansas c/o Barton County Courthouse, Great Bend, Kansas 67530.

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Attorneys for Respondent, Byron Timothy Liggett, M. D.

APPENDIX D

JOURNAL ENTRY OF BARTON COUNTY DISTRICT COURT, DATED AUGUST 16, 1977, CONCERNING APPELLANT'S REQUEST FOR ADDITIONAL FINDINGS AND CONCLUSIONS

APPENDIX "B"

IN THE DISTRICT COURT OF
BARTON COUNTY, KANSAS

No. 27154

THE STATE OF KANSAS, ex rel. Curt T. Schneider,
Attorney-General,
Petitioner,

vs.

BYRON TIMOTHY LIGGETT, M. D.,
Respondent,

KANSAS HOSPITAL ASSOCIATION, KANSAS MEDICAL SOCIETY and KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Intervenors.

JOURNAL ENTRY ON RESPONDENT'S REQUEST FOR ADDITIONAL FINDINGS AND CONCLUSIONS

On this 16th day of August, 1977, respondent's motion for additional findings and conclusions was presented to the court, and after oral argument, the court finds that said motion should be, and is denied, except to the extent reflected by the transcript of the ruling of the court, which

is attached to and made a part of this journal entry by reference.

Costs are ordered taxed to the respondent.

/s/ Frederick Woleslagel,
Frederick Woleslagel,
Judge, Division One.

IN THE DISTRICT COURT OF
BARTON COUNTY, KANSAS

No. 27154

THE STATE OF KANSAS, ex rel. Curt T. Schneider,
Attorney-General,
Petitioner,

vs.

BYRON TIMOTHY LIGGETT, M. D.,
Respondent,

KANSAS HOSPITAL ASSOCIATION, KANSAS MEDICAL SOCIETY, and KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Intervenors.

TRANSCRIPT OF COURT'S RULING ON RESPONDENT'S MOTION FOR ADDITIONAL FINDINGS AND CONCLUSIONS

Proceedings had before the Honorable Frederick Woleslagel, Judge of Division One, at Great Bend, Kansas, on August 16, 1977.

APPEARANCES:

The petitioner appeared by Donald E. Jensen, Assistant Attorney-General, of Topeka, Kansas.

The respondent appeared in person, and by his attorneys, Holland and Rupe, by Alan L. Rupe, of Russell, Kansas.

The intervenors Kansas Hospital Association and Kansas Medical Society appeared by their attorneys, Goodell, Casey, Briman & Cogswell, by Wayne T. Stratton, of Topeka, Kansas, and Ward & Berscheidt, by Thomas J. Berscheidt of Great Bend, Kansas.

The intervenor Kansas Health Care Provider Insurance Availability Plan appeared by its attorneys, Glenn, Cornish & Leuenberger, by L. M. Cornish, Jr., of Topeka, Kansas.

* * *

THE PROCEEDINGS, IN PART, ARE AS FOLLOWS:

* * *

THE COURT: At the time of giving the decision in this case I felt that I had covered everything that was necessary to cover. I felt the paramount question, or the underlying question, was whether or not the statutory enactment, considering all of the committee legislative history involved, met the test of being acceptable as within what we call the police power of the state. I thought that was all that was necessary to a decision in this case. I still think it is all that is necessary to a decision in the case.

I am really not impressed by the argument that the respondent raised about issues that were not covered by my opinion. Actually, I think those issues were inferentially covered, if not directly covered, and I am not able to understand why respondent could not appeal from the decision without there being the type of coverage of the two issues that respondent says he desires.

I, in fact, had the impression that respondent had appealed the decision, but I see nothing in the file to

indicate that. I guess newspaper reports quoted the respondent and indicated that he had appealed.

However that may be, I will address myself briefly to the two issues that respondent says were not covered, and in doing this, if it is acceptable to counsel, I will ask the court reporter to transcribe what I have said, starting back at the beginning, and going on through, and letting that be the journal entry of judgment in this case. Do counsel see any weakness in that?

MR. STRATTON: We do not, your Honor.

THE COURT: Well, it would be a writing that I have now denominated to be a journal entry of judgment, consequently I assume that it complies with the Supreme Court rule as being a writing indicating judgment.

I am not able to follow respondent's position relative to the 14th Amendment and the 5th Amendment. The 5th Amendment, as I understand, is the amendment that provides for certain individual rights. The interplay with the 14th Amendment is only for the purpose of making those rights applicable not just to the federal government, but also to the state governments.

As Justice Black stated many, many years ago, rights provided in the 14th Amendment are made applicable to the states. Justice Black, interestingly enough, took the position that the 14th Amendment by its words made all of the ten Amendments applicable. This position, of course, was not adopted, and what has happened with the passage of time, additional parts of the first ten Amendments are held by the United States Supreme Court to be applicable to the states.

There is no question in my mind, nor has any argument been presented here by the petitioner that 5th Amendment rights are not made applicable to the states by virtue of the 14th Amendment. I would adopt the argument

of respondent that statements have been made by many courts that the right to work is protected by the 5th Amendment. This includes statements by the United States Supreme Court. Sometimes the statements that a court makes are broader than what they appear to mean, at least with the passage of time they are narrowed down, but I think that is the situation as it applies here to this case, and I think that was adequately covered in my opinion.

Do you need to leave, Doctor?

MR. LIGGETT: Yes, I do, I do have an appointment.

THE COURT: Now, you will please come back and sit down while I am going through this, or I will have to—I am going to see that contempt proceedings are filed against you.

MR. LIGGETT: I am just leaving, and I gave you an answer.

THE COURT: This is the second time you have left court proceedings without indicating any justified excuse.

MR. RUPE: May I have a recess to talk with my client, please, Judge?

THE COURT: You may have.

MR. RUPE: Thank you.

(A short recess was taken, and Mr. Rupe and Mr. Liggett leave the court room, and then return.)

MR. RUPE: I am sorry, your Honor.

THE COURT: I would think it would be a fair statement to say that as the law stands today, the right of an individual to practice a particular occupation, and I think this is particularly true as it relates to a profession, is not an absolute right, but is subject to reasonable restrictions. Accordingly, in the decision that I entered, even

though respondent says I did not cover this point, I spoke of it as being not a right but a privilege, and I think the point was adequately covered by that decision. If not, I think it is adequately covered at this time.

The second point that respondent claims was not covered was the point relative to his claim that any restrictive regulations must relate to the ability to practice a profession. Respondent claims that the State stipulated that the legislation here involved did not relate to the ability to practice.

I think the petitioner's position was clarified, if it needs to be clarified, by Mr. Stratton. I have no recollection that such a stipulation was made. I do have the recollection that the State said that as far as the ability of the respondent as a doctor was concerned, the petitioner was not claiming he was not an able medical practitioner. If they claimed that, and the State was going to bring some type of an action, I would think it would be a different type of action and would be before the Board of Healing Arts. So, I can't think that there has been any confusion, really, as to what the positions of each side were as to that issue. Accordingly, I am rejecting it as being unfounded—the claim made by the respondent that the State made such a stipulation.

Once again, in the decision that I entered, I inferentially, if not directly, spoke about this legislation having a relationship to the practice of medicine in this State. I did it very briefly because, as I said before, I did not think that was necessary to a decision in this case. But I think at that time, for example, I mentioned that the legislative committees heard a history to the effect that the cause of the situation that we had relative to medical malpractice and insurance costs, was that doctors, at least some doctors, were practicing defensive medicine instead of practicing medicine the best way they knew how.

That is really what it amounts to. I do not think I stated it that way in my decision, but the essence of defensive medicine, I believe, is that the doctors conduct themselves in a way to avoid lawsuits, as being their major concern, rather than practicing their profession in a way to give the best service to their client, even though by so doing at a later time they might be opening up themselves to malpractice litigation. As to this, for example, I think I mentioned Dr. David Robinson who was not just a national, but an international authority in the field of plastic surgery, and he made, as I recall, such a statement as this in the committee hearings.

Now, with this background, certainly it was not unreasonable for the legislature to conclude that the situation we had in this State relative to malpractice actions and insurance costs did have an effect upon the type of medicine that was being practiced.

Ability to practice medicine—what do we mean? Do we mean innate ability? Do we mean what the person does under all circumstances, and if the circumstances of malpractice are such that a person doesn't do the job he should do, then maybe that can be called ability.

Now, I think I have adequately talked about this point, and I think that brings this to a conclusion. The application of the respondent is denied. The injunction has been in effect ever since the first decision, in my opinion, and is still in effect.

Now, Doctor, you have been quoted in one or more papers as making some response to the decision entered by this court. You are free to do that, of course. You are not free to show contempt for the court in the way you have done on two occasions, one at the pretrial we had, and one at this hearing here. You are not free to do that, and I am not impressed by your conduct at all.

I do not think that I will cause contempt proceedings to be instituted against you because I think you are emotionally upset at this time, and were at that time. I would have thought, being a professional person, you would have known this. Either you didn't know, or you didn't care enough to overcome your emotional reactions.

Does anybody have anything further?

MR. STRATTON: I have nothing.

THE COURT: If not, thank you gentlemen, and we stand recessed.

* * *

STATE OF KANSAS,
STAFFORD COUNTY, SS.

CERTIFICATE

I, Russell W. Walker, a Certified Shorthand Reporter of Kansas, and Official Court Reporter of Division One, 20th Judicial District of Kansas, certify that I reported in shorthand the proceedings had in the district court of Barton County, Kansas, before the Honorable Frederick Woleslagel, Judge of Division One, at Great Bend, Kansas, on August 16, 1977, in Case No. 27154, The State of Kansas, ex rel. Curt T. Schneider, Attorney-General, Petitioner, v. Byron Timothy Liggett, M. D., respondent, et al.

I further certify that the foregoing transcript of my shorthand notes is a true copy of said proceedings as indicated.

IN WITNESS WHEREOF, I have set my hand and official seal at St. John, Kansas, this 18th day of August, 1977.

/s/ Russell W. Walker
CSR

APPENDIX E

APPELLANT'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF KANSAS

Case No. 49,446

STATE OF KANSAS, ex rel., Curt T. Schneider, Attorney General,
Petitioner-Appellee,

KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Intervenors-Appellees,

vs.

BYRON TIMOTHY LIGGETT, M.D.,
Respondent-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed April 3, 1978)

I. Notice is hereby given that Byron Timothy Liggett, M. D., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas entered in this action on the 10th day of March, 1978, affirming the judgment of the District Court of Barton County, Kansas, of August 2, 1977, and August 16, 1977, and the constitutionality of K. S. A. 1976 Supp. 40-3402, and K. S. A. 1976 Supp. 40-3416, as not contravening the

due process guaranty of the Fourteenth Amendment of the United States Constitution.

II. This appeal is taken pursuant to 28 USCS 1257 (2).

III. The following question is presented by this appeal:

> Do K. S. A. 1976 Supp. 40-3402 and K. S. A. 1976 Supp. 40-3416 deny appellant due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution by enjoining and prohibiting appellant, a duly licensed and practicing physician under the Healing Arts Act of Kansas, K.S.A. 65-2801 et seq., from pursuing further his profession within the State of Kansas for a reason that has no rational connection to appellant's fitness or capacity to practice medicine, i. e., appellant's refusal to purchase professional liability insurance in an amount of not less than One Hundred Thousand Dollars ($100,000.00) per occurrence, subject to not less than Three Hundred Thousand Dollars ($300,000.00) annual aggregate for all claims made during the policy period?

Holland & Rupe

/s/ Michael S. Holland
Michael S. Holland
Attorneys at Law
P. O. Box 206
618 Main
Russell, Kansas 67665
Phone 913-483-5332

Attorneys for Respondent-Appellant, Byron Timothy Liggett, M. D.

PROOF OF SERVICE

STATE OF KANSAS)
) SS.
COUNTY OF RUSSELL)

I, Michael S. Holland of the firm of Holland & Rupe, Russell, Kansas, first being duly sworn, states that he is one of the attorneys for Byron Timothy Liggett, M. D., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 31st day of March, 1978, he served copies of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the parties hereinbelow named in the manner and method as follows:

(1) On the State of Kansas, ex rel., Curt T. Schneider, Attorney General of the State of Kansas, by depositing a copy of said NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in the United States Post Office, with first class postage prepaid, addressed to Mr. Curt T. Schneider, Attorney General, First Floor, Statehouse, Topeka, Kansas 66612, attorney of record for the State of Kansas;

(2) On the Kansas Hospital Association and the Kansas Medical Society, by depositing a copy of said NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in a United States Post Office, with first class postage prepaid, addressed to Mr. Wayne T. Stratton of the firm of Goodell, Cogswell, Stratton, Edmonds, Palmer & Wright, 215 East 8th Street, Topeka, Kansas 66603, and upon Mr. Jerry M. Ward of the firm of Ward & Berscheidt, 1324 Kansas Avenue, Great Bend, Kansas 67530, attorneys of record for the Kansas Hospital Association and The Kansas Medical Society;

(3) On the Kansas Health Care Provider Insurance Availability Plan, by depositing a copy of said NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES in a United States Post Office, with first class postage prepaid, addressed to Mr. L. M. Cornish, Jr. of the firm of Glenn, Cornish & Leuenberger, 610 First National Tower, Topeka, Kansas 66603, attorneys of record for the Kansas Health Care Provider Insurance Availability Plan.

That the Original of said NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES and eight (8) copies thereof were mailed to Mr. Lewis C. Carter, Clerk of the Appellate Court, c/o State Capitol Building, Topeka, Kansas 66612, by depositing same in the United States mail, first class postage prepaid, on this 31st day of March, 1978.

Holland & Rupe

/s/ Michael S. Holland
Michael S. Holland
Attorneys at Law
P. O. Box 206
618 Main
Russell, Kansas 67665
Phone 913-483-5332
Attorneys for Respondent-Appellant, Byron Timothy Liggett, M. D.

Subscribed and sworn to before me, the undersigned, a Notary Public, this 31st day of March, 1978.

/s/ Virginia Lee Scott
Virginia Lee Scott
(Seal) Notary Public

My appointment expires June 17, 1981.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 49,446

State of Kansas, ex rel., Curt T. Schneider, Attorney General, Appellee,

v.

Kansas Hospital Association, et al., Intervenors-Appellees; Byron Timothy Liggett, M.D., Appellant.

CERTIFICATE

State of Kansas, Supreme Court, ss.

I, LEWIS C. CARTER, Clerk of the SUPREME COURT OF THE STATE OF KANSAS, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal to the Supreme Court of the United States filed with Clerk of Kansas Supreme Court on April 3, 1978 in the above entitled cause as the same appears of record in said court and on file in my office.

WITNESS my hand and the seal of said court, hereunto affixed at my office in the city of Topeka, this 20th day of April, A. D. 1978

/s/ Lewis C. Carter
Lewis C. Carter
Clerk Supreme Court

By .....
Deputy Clerk

APPENDIX F

ANSWER FILED BY APPELLANT TO PETITION SEEKING TO ENJOIN APPELLANT FROM PRACTICE OF MEDICINE

IN THE
DISTRICT COURT OF BARTON COUNTY, KANSAS

No. 27,154

State of Kansas, ex rel. CURT T. SCHNEIDER,
Attorney General,
Petitioner

vs.

BYRON TIMOTHY LIGGETT, M. D.,
Respondent

ANSWER

Comes now the respondent, Byron Timothy Liggett, M. D., and for his answer to the above entitled matter, states and says:

1. Respondent admits Paragraphs 1, 2, 3 and 4, of said petition.

2. Respondent denies Paragraph 5 of said petition, as pursuant to K. S. A. 65-2801 et seq., and specifically K. S. A. 65-2803, K. S. A. 65-2804, K. S. A. 65-2807, respondent has met and fulfilled all medical requirements and conditions of the State of Kansas rationally related to respondent's fitness, capacity and ability to perform as a physician within the State of Kansas; that respondent, as is alleged in petitioner's petition, Paragraph 3, is licensed

by the State Board of Healing Arts for the practice of medicine and surgery, and thereby respondent has the right to practice medicine within the State of Kansas. See K. S. A. 65-2807:

> Every license issued under this act shall be presumptived evidence of the right of the holder thereof to practice that branch of the healing arts for which said license is issued.

3. Respondent admits Paragraph 6, but alleges that the State of Kansas has violated respondent's constitutional right to work for a living without and free from unreasonable governmental interference and regulation and respondent's constitutionally guaranteed right to due process and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Sections One and Two of the Kansas Bill of Rights, as more specifically alleged hereinbelow.

4. Respondent denies Paragraph 7 of said petition and alleges that respondent is a duly licensed physician of the State of Kansas pursuant to K. S. A. 65-2801, et seq., and is qualified to practice his chosen profession within the State of Kansas the same as dentists or lawyers or other licensed professions within the State of Kansas.

5. Respondent admits Paragraph 8 of said petition.

6. For further answer and defense to said petition, respondent alleges and avers the following, to-wit:

FIRST DEFENSE

Section Two and Section Sixteen, Chapter 231 of the 1976 Kansas Session Laws violates Sections One and Two of the Bill of Rights of the Kansas Constitution and the Fifth and Fourteenth Amendments of the United States

Constitution and thereby said sections are unconstitutional, null and void for the following reasons, to-wit:

(1) Substantive due process guarantees that no person will be deprived of his life, liberty or property for arbitrary reasons.

(2) That substantive due process guarantees that a physician will not be deprived of his right to practice medicine for reasons that do not have a rational connection with his fitness or capacity as a physician.

(3) The requirement that respondent must first have professional liability insurance, medical malpractice insurance, has no rational connection with respondent's fitness or capacity as a practicing physician.

(4) The requirement that respondent must have medical malpractice insurance before he can exercise his right to work for a living, yet excluding dentists, lawyers and other licensed professions of the State of Kansas, is arbitrary and discriminatory.

(5) That Sections Two and Sixteen of Chapter 231, 1976 Kansas Session Laws deprives respondent of his property, property rights, personal privileges, all of which are constitutionally guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and of his constitutionally guaranteed right of equal protection of and to the law, and most importantly, respondent is deprived of the right to work for a living in a common occupation of the community, which is the very essence of personal freedom and opportunity guaranteed by the Fourteenth Amendment to the United States Constitution.

SECOND DEFENSE

Sections Two and Sixteen of Chapter 231, 1976 Session Laws of Kansas specifically, and Chapter 231 gener-

ally, are unreasonable, arbitrary, discriminatory (excludes dentists), capricious, oppressive and an unconstitutional exercise of the police power of the state violating and abridging fundamental personal liberties by interfering in the private and individual business practices of respondent and denying respondent equal protection of the law, due process of law and the right to the pursuit of happiness and the right to work for a living in violation of Sections One and Two of the Bill of Rights of the Kansas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

THIRD DEFENSE

Chapter 231 of the 1976 Session Laws is unconstitutional, null and void in violation of the equal protection guaranty of the Fourteenth Amendment of the United States Constitution and Sections One and Two of the Bill of Rights of the Kansas Constitution in that said statute arbitrarily discriminates against physicians and the respondent by its exclusion from compulsory malpractice insurance of dentists, lawyers and all other licensed professions of the State of Kansas that deal with the public in general; that such classification of physicians is unreasonable, arbitrary, discriminatory and oppressive and has no just, fair, substantial, reasonable or rational connection with the purpose of said legislation, and that no governmental interest is fulfilled by said statute.

FOURTH DEFENSE

Chapter 231 of the 1976 Session Laws violated Article Two, Section Sixteen of the Kansas Constitution, as Chapter 231 contains more than one subject matter, i. e., the establishment of a health care stabilization fund and also the amendment of K. S. A. 1975 Supp. 46-155.

FIFTH DEFENSE

Chapter 231, 1976 Session Laws, Section Two (a) (3) (b), violates due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution by placing an unreasonable burden upon a nonresident practitioner who is legally authorized and licensed to practice law within the State of Kansas; that Chapter 231 is overly broad in violation of the First Amendment of the United States Constitution, unreasonable and impractical as it denies to the citizens of the State of Kansas who are physically or medically unable to travel access to and the availability of emergency medical assistance from nonresident specialists for no rational, or reasonable or medically related reasons. Likewise, Chapter 231 of the 1976 Session Laws in general is overly broad and unconstitutional in violation of the First Amendment of the United States Constitution as denying to the citizens of Kansas and the United States the assistance and availability of medical treatment, specialization and medical technology of physicians duly qualified, licensed and capable of providing such medical treatment and specialization for no rational, reasonable or medically related reasons or purposes.

SIXTH DEFENSE

Chapter 231, Section Two (c) and Section Four (b), are unconstitutional as said sections deprive respondent of his property without due process of law, i. e., requiring respondent to help pay for the negligent acts of others; that said statutes deny respondent equal protection of the law by requiring respondent to pay for the fundamental right to work for a living and to pursue his profession, which he is duly licensed and qualified to pursue; that it penalizes the competent, careful and diligent practitioner

and permits the incompetent a means by which to continue to practice medicine.

SEVENTH DEFENSE

Chapter 231, Section Three (c), 1976 Session Laws violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Sections One and Two of the Kansas Bill of Rights by prohibiting a successful claimant from recovering immediately and forthwith the full amount of said judgment awarded; that such classification of a successful claimant in a medical malpractice action, is arbitrary, discriminatory and unreasonable; that the legislature of the State of Kansas cannot deny to a successful claimant in a medical malpractice action his or her right to possession and recovery of the monetary award, and that to do so permits the state to use the successful claimant's money, interest free, thereby depriving the successful claimant of the use of said money and the interest earned thereon which by adjudication has been declared and awarded to said claimant as his sole and absolute property; that said statute arbitrarily discriminates against the self-insurer, as no provision is made for installment payments of judgments recovered against the self-insurer, thereby denying to the self-insurer equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution.

EIGHTH DEFENSE

Chapter 231, Section Five, 1976 Session Laws is null and void for the following reasons:

(1) Said section authorizes the violation of the cash basis law of the State of Kansas;

(2) Said section permits removal of taxpayer's money from the general fund for special and individual purposes with no guarantee of reimbursement;

(3) That the state has no authority to loan money, and specifically no authority to loan tax money from the general fund to a special interest fund;

(4) That after Section Five expires July 1, 1981, there is no legislative means by which to repay to the general fund any outstanding indebtedness of said fund existing as of July 2, 1981;

(5) The state has no authority to compete with or against private enterprise or to engage in the insurance business;

(6) The 1976 legislature cannot commit future legislators to the loaning of taxpayer's money, i. e., the general fund to the health care stabilization fund to cover its debts, which may be tremendous.

WHEREFORE, respondent asks and prays that petitioner's request to enjoin respondent from rendering professional services be denied; that Chapter 231 of the 1976 Session Laws of the State of Kansas be declared null and void and costs of this action, including attorney fees, be taxed to the petitioner, the State of Kansas.

/s/ Michael S. Holland
Michael S. Holland
Attorney at Law
P.O. Box 206
618 Main
Russell, Kansas 67665
Phone No. 913-483-2542
Attorney for Respondent, Byron Timothy Liggett, M. D.

CERTIFICATE OF SERVICE

I, Michael S. Holland, do hereby certify that I mailed a true and correct copy of the above and foregoing ANSWER by depositing same in the United States mail, postage prepaid and propertly addressed to the following, to-wit: Mr. John R. Martin, First Assistant Attorney General, First Floor-State Capitol Building, Topeka, Kansas 66612, this 11th day of October, 1976.

/s/ Michael S. Holland
Michael S. Holland
Attorney at Law
P.O. Box 206
618 Main
Russell, Kansas 67665
Phone No. 913-483-2542
Attorney for Respondent, Byron Timothy Liggett, M. D.

APPENDIX G

PARTIAL TRANSCRIPT OF ORAL ARGUMENT ON JULY 5, 1977, BEFORE THE DISTRICT COURT OF BARTON COUNTY, KANSAS

* * *

THE PROCEEDINGS, IN PART, ARE AS FOLLOWS:

. . .

THE COURT: I have one question—accepting your invitation.

MR. STRATTON: Yes, your Honor.

THE COURT: Mr. Stratton, as I understand Mr. Holland, his position is that in order for this legislation to be constitutionally valid, the legislation must have a rational connection with the ability of practitioners. You concede the legislation has no connection with ability?

MR. STRATTON: Well, in a normal sense, yes, I suppose it has to do with the financial ability.

THE COURT: We are normal people, dealing with normal things, as far as I know.

MR. STRATTON: Yes.

THE COURT: I take your answer to be that you concede there is no connection with ability in this legislation?

MR. STRATTON: Ability being in the sense of knowledge to carry out one's profession, knowledge and skill to carry out one's profession, yes, I would so concede that.

THE COURT: Your position then is that that is not an accurate statement of the law?

MR. STRATTON: That is correct, your Honor. May I expand upon that?

Our position is that the statement is accurate as far as it goes, but I think the statements originated back beginning with, I believe, the Dent decision in 1888. At that time the courts were involved in the question of whether or not they could impose requirements upon lawyers, physicians and professional people, and so there are some broad statements to the effect that the constitution does permit imposing such requirements, based upon a person's knowledge and ability, in order to license him. My point, however, your Honor, is that those cases do not set out a limitation of regulation, but merely a minimum of regulation. They stand for the proposition it is permissible for the State to license a person based upon his knowledge, based upon his skill, but they certainly don't stand for the proposition that the State can't go any further than that.

THE COURT: Thank you.

MR. STRATTON: Thank you.

. . .

* * *

STATE OF KANSAS,
STAFFORD COUNTY, SS.

CERTIFICATE

I, Russell W. Walker, a Certified Shorthand Reporter of Kansas, and Official Court Reporter of Division One, 20th Judicial District of Kansas, certify that I reported in shorthand the proceedings had in the district court of Barton County, Kansas, before the Honorable Frederick Woleslagel, Judge of Division One, at Great Bend, Kansas, in Case No. 27154, The State of Kansas, ex rel., petitioner, v. Byron Timothy Liggett, M. D., respondent, et al.

I further certify that the foregoing transcript of my shorthand notes is a true copy of that portion of the proceedings set forth by this transcript.

IN WITNESS WHEREOF, I have set my hand and official seal at St. John, Kansas, this 12th day of August, 1977.

/s/ Russell W. Walker
CSR

APPENDIX H

K. S. A. 1976 SUPP. 40-3402

K. S. A. 1976 Supp. 40-3402. (a) A policy of professional liability insurance approved by the commissioner and issued by an insurer duly authorized to transact business in this state in which the limit of the insurer's liability is not less than one hundred thousand dollars ($100,000) per occurrence, subject to not less than a three hundred thousand dollar ($300,000) annual aggregate for all claims made during the policy period, shall be maintained in effect by each resident health care provider as a condition to rendering professional service as a health care provider in this state, unless such health care provider is a self-insurer. Such policy shall provide as a minimum coverage for claims made during the term of the policy which were incurred during the term of such policy or during the prior term of a similar policy.

(1) Each insurer providing basic coverage shall within thirty (30) days after the premium for the basic coverage is received by the insurer or within thirty (30) days from the effective date of this act, whichever is later, notify the commissioner that such coverage is or will be in effect. Such notification shall be on a form approved by the commissioner and shall include information identifying the professional liability policy issued or to be issued, the name and address of all health care providers covered by the policy, the amount of the annual premium, the inception and expiration dates of the coverage and such other information as the commissioner shall require. A copy of the notice required by this subsection shall be furnished the named insured.

(2) In the event of termination of basic coverage by cancellation, nonrenewal, expiration or otherwise by either the insurer or named insured, notice of such termination shall be furnished by the insurer to the commissioner, the state agency which licenses, registers or certifies the named insured and the named insured. Such notice shall be provided no less than thirty (30) days prior to the effective date of any termination initiated by the insurer or within ten (10) days after the date coverage is terminated at the request of the named insured and shall include the name and address of the health care provider or providers for whom basic coverage is terminated and the date basic coverage will cease to be in effect. No basic coverage shall be terminated by cancellation or failure to renew by the insurer unless such insurer provides a notice of termination as required by this subsection.

(3) Any professional liability insurance policy issued, delivered or in effect in this state on and after the effective date of this act shall contain or be endorsed to provide basic coverage as required by subsection (a) of this section. Notwithstanding any omitted or inconsistent language, any contract of professional liability insurance shall be construed to obligate the insurer to meet all the mandatory requirements and obligations of this act.

(b) Unless a nonresident health care provider is a self-insurer, such provider shall not render professional service as a health care provider in this state unless such provider maintains coverage in effect as prescribed by subsection (a) of this section, except such coverage may be provided by a non-admitted insurer who has filed the form required in paragraph (1) of subsection (b) of this section.

(1) Every insurance company authorized to transact business in this state, that is authorized to issue professional liability insurance in any jurisdiction, shall file with the commissioner, as a condition of its continued transaction of business within this state, a form prescribed by the commissioner declaring that its professional liability insurance policies, wherever issued, shall be deemed to provide at least the insurance required by this subsection when the insured is rendering professional services as a nonresident health care provider in this state. Any non-admitted insurer may file such a form.

(2) Every nonresident health care provider who is required to maintain basic coverage pursuant to this subsection shall pay the surcharge levied by the commissioner pursuant to subsection (a) of K. S. A. 1976 Supp. 40-3404 directly to the commissioner and shall furnish to the commissioner the information required in paragraph (1) of subsection (a) of this section.

(c) Every health care provider that is a self-insurer shall pay the surcharge levied by the commissioner pursuant to subsection (a) of K. S. A. 1976 Supp. 40-3404 directly to the commissioner and shall furnish to the commissioner the information required in paragraph (1) of subsection (a) of this section.

APPENDIX I

SUPREME COURT RULE NO. 6.02

RULE NO. 6.02
CONTENT OF APPELLANT'S BRIEF

The appellant's brief shall contain the following:

(a) A table of contents of the entire brief, with page references to each division and subdivision including each issue presented and the authorities relied upon in support of each.

(b) A brief statement of the nature of the case, e. g., whether a personal injury suit, injunction, quiet title, etc., and a brief statement of the nature of the judgment or order from which the appeal was taken.

(c) A brief statement, without elaboration, of the issues to be decided on the appeal.

(d) A factual statement of the case, i. e., a concise but complete statement, without argument, of all the facts of the case material to the determination of the question or questions presented for appellate decision. The facts stated therein shall be keyed to the record on appeal so as to make verification reasonably convenient. Any material statement made without such a reference may be presumed to be without support in the record.

(e) The arguments and authorities relied upon, subdivided as to the separate issues in the appeal if more than one.

(f) At the option of the appellant, an appendix consisting of limited extracts from the record on appeal, which extracts the appellant considers to be of critical importance to the issues in the appeal. Such an appendix is merely for the court's convenience and is not to be considered as a substitute for the record itself. When such an appendix is included, the statement of the case and the brief may make references to it, but such references shall be supplementary to the references required to the volume and pages of the record itself and not in lieu thereof.

Supreme Court, U. S.
FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1621

BYRON TIMOTHY LIGGETT,
Appellant,

vs.

STATE OF KANSAS, EX REL., CURT T. SCHNEIDER, ATTORNEY GENERAL, KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JOINT MOTION TO DISMISS OR AFFIRM

CURT T. SCHNEIDER
Attorney General

DONALD R. HOFFMAN
Assistant Attorney General
State Capitol Building
Topeka, Kansas 66612
Attorneys for State of Kansas—Petitioner-Appellee

(Other Counsel on Inside Cover)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1621

BYRON TIMOTHY LIGGETT,
Appellant,

vs.

STATE OF KANSAS, EX REL., CURT T. SCHNEIDER, ATTORNEY GENERAL, KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JOINT MOTION TO DISMISS OR AFFIRM

The appellees move, pursuant to S.Ct.R. 16, to dismiss this appeal or affirm the decree on the ground that: (1) the Kansas Supreme Court specifically found, as a factual matter, that the statute in question was reasonably necessary to the promotion of the public health and welfare; (2) this court has held in a long line of cases that such a finding is sufficient to uphold a statute as against a due process attack; and (3) the issue presented is therefore not a substantial federal question deserving of briefing or argument.

I.

STATEMENT

A.

Statutes

The appellant seeks to challenge a compulsory insurance requirement imposed upon him by the Kansas Health Care Provider Insurance Availability Act [Kan. Stat. Ann. 40-3401 to 3419 (Supp. 1977)]. The Act was passed by the 1976 Kansas legislature, along with 11 other bills, as a response to what was perceived to be a severe problem caused by increasing premiums for and decreasing availability of professional liability insurance for health care professionals. *See generally* Note, *Recent Legislation*: The *Kansas Approach to Medical Malpractice*, 16 Washburn L.J. 395 (1977). The primary feature of the act is a requirement that all "health care providers" carry, as a condition of practicing within the state, basic professional liability coverage in the amount of $100,000 per occurrence with a $300,000 annual aggregate for all claims made during the policy period. Kan. Stat. Ann. 40-3402(a) (Supp. 1977). In addition, all health care providers are required to pay a surcharge on all policies, which in turn is paid into a state-administered fund that provides excess coverage for any liability beyond the basic $100,000/$300,000 limit. Kan. Stat. Ann. 40-3404(a) (Supp. 1977). The term "health care provider" is defined as a person licensed or who holds a temporary or fellowship permit under the Kansas Healing Arts Act, a medical care facility, a health maintenance organization, an optometrist, a podiatrist, a pharmacist, a nurse anesthetist, or a professional corporation made up of individuals engaged in such professions, a dentist licensed to administer anesthetics, a physical therapist,

or a mental health center or clinic. Kan. Stat. Ann. 40-3401(f) (Supp. 1977).

B.

Proceedings Below

The appellant in this case, a physician, refused to comply with the compulsory insurance requirement and, on August 2, 1977, was enjoined by the District Court of Barton County, Kansas from practicing medicine until such time as he did so. By entering such an order, the court rejected the appellant's contention that the requirement violated the due process and equal protection clauses of the fourteenth amendment.

Although the trial court recognized the constitutional issues alleged to exist, it viewed the case as one primarily hinging upon its peculiar facts. The record before it consisted of over 1,000 pages of legislative testimony and other material replete with references to the twin problems of increasing costs and decreasing availability of malpractice insurance. The record reflected significant concern as to the possibility that the problems might drive established practitioners from the state and discourage new ones from establishing themselves, thereby causing a general decrease in the quality of health care available to the Kansas public. Kansas is, of course, a rural state with an already-severe health care problem caused by a shortage of trained personnel. The trial court concluded, in light of the impressive testimony outlining the problem and proposing compulsory insurance as the most likely solution, that without question the legislature could have reasonably decided that compulsory insurance was necessary. In support of its conclusion, the trial court entered, as an appendix to its Journal Entry of Judgment, numerous findings of fact outlining in detail the lengthy testi-

mony heard by the legislature. The appellant has neglected to include that appendix in his jurisdictional statement but it may be found herein as Appendix A.

Upon appeal to the Supreme Court of Kansas, the decision of the trial court was affirmed. *State ex rel. Schneider* v. *Liggett,* 223 Kan. 610, 576 P.2d 221 (1978). The Kansas Supreme Court rejected the appellant's equal protection claim, a point that is not pursued here. It also held that the mandatory insurance provisions do not violate due process, finding that "[m]andatory malpractice insurance bears a rational relationship to the health and welfare of the citizens of this state by not only providing protection to patients who may be injured as a result of medical malpractice, but by assuring that there continues to exist in the state an adequate supply of health care providers." *Id.* 223 Kan. at 616, 576 P.2d at 227.

II.

ARGUMENT

Ever since the demise of substantive due process exemplified by *Lochner* v. *New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), this court has generally refused to inject itself into a legislative debate as to the wisdom or utility of a particular legislative policy. *See Moore* v. *City of East Cleveland, Ohio,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Ferguson* v. *Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Bartkus* v. *Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Nebbia* v. *New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). As this court has expressly stated, it does not "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends

the public welfare." *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469, 472 (1952). State legislatures thus have "constitutional authority to experiment with new techniques" entitling them to their "own standard of the public welfare" and this court will "leave debatable issues as respects business, economics, and social affairs to legislative decision." *Id.,* 342 U.S. at 423, 425, 72 S.Ct. at 407, 408, 96 L.Ed. at 472, 473. As was said in *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), a case involving state regulation of ophthalmologists, optometrists and opticians:

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Id. 348 U.S. at 488, 75 S.Ct. at 464, 99 L.Ed. at 572.

The appellant nonetheless suggests that those established principles are somehow inapplicable to him. He contends that in the area of occupational licensing this court has forever limited the parameters of the police power to regulation reasonably related to fitness and competency. To the contrary, however, this court has expressly stated that the boundaries of the police power are always flexible, never rigid. *Berman* v. *Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Noble State Bank* v. *Haskell,* 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112 (1911). This court has in fact repeatedly recognized that the states

possess especially broad power in the area of occupational licensing because it is so peculiarly affected by the public interest. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *In Re Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1975 (1945). *See also Buschbacher* v. *Supreme Court of Ohio*, No. C-2-75-743 (S.D. Ohio, filed Oct. 13, 1976), *affirmed Mem. sub. nom., Cuyahoga County Bar Association* v. *Supreme Court of Ohio*, 430 U.S. 901, 97 S.Ct. 1167, 51 L.Ed.2d 577 (1977).

For example, in *Williamson* v. *Lee Optical Co.*, the law in question prohibited opticians from fitting or duplicating lenses without a prescription. It also prohibited advertising by all eye care professionals and barred retail stores from furnishing space for eye examinations. The requirements clearly bore no particular relationship to fitness or competency. In fact, the evidence tended to show that the public benefit was at best remote and, in all likelihood, imaginary. Nonetheless, the law was upheld:

> The . . . law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Id. 348 U.S. at 487-88, 75 S.Ct. at 464, 99 L.Ed. at 571-72.

Moreover, even during the *Lochner* era of due process this court recognized that the state could, pursuant to its police power, require members of a given profession

to maintain a bond. It upheld a Kansas law that required livestock commission merchants to provide a bond as a prerequisite to doing business. *Payne* v. *State ex rel. Brewster*, 248 U.S. 112, 39 S.Ct. 32, 63 L.Ed. 153 (1918), *affirming State ex rel. Brewster* v. *Mohler*, 98 Kan. 465, 158 P. 408 (1916). Similarly, mandatory insurance for public carriers has withstood the same attack made here. *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, 52 S.Ct. 595, 76 L.Ed. 1155 (1932). Health care is certainly as affected with the public interest as are public carriers. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 354, 95 S.Ct. 449, 455, 42 L.Ed.2d 477, 485 (1974); *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612, 55 S.Ct. 570, 572, 79 L.Ed. 1086, 1090 (1935); *Nebbia* v. *New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Finally, a form of insurance that affects every citizen has been upheld by this court—Social Security. *Helvering* v. *Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937).

In consequence, several state courts have upheld mandatory insurance or bond requirements. *See City of Tucson* v. *Stewart*, 45 Ariz. 36, 40 P.2d 72 (1935). Compulsory insurance is therefore a fact of life for many professions and occupations. The Kansas Supreme Court identified seven different vocations required by Kansas law to maintain liability insurance. *State ex rel. Schneider* v. *Liggett*, 223 Kan. 610, 615, 576 P.2d 221, 226 (1978). The Idaho Supreme Court identified nine in an opinion presenting the identical question involved here. *Jones* v. *State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 173, 53 L.Ed.2d 223 (1977). Thus, the issue has long been settled and no longer presents a substantial federal question. This court obviously recognized that just last term when it denied certiorari in *Jones* v. *State Board of Medicine*.

The two cases relied upon by the appellant do not stand for a contrary result. The first, *Dent* v. *West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889), was an early occupational licensing case in which the court recognized the breadth of the police power and that under it the states were "authorized" to impose training and skill requirements on the professions. *Id.*, 129 U.S. at 122, 9 S.Ct. at 223, 32 L.Ed. at 626. The case does not stand for the proposition asserted by the appellant and most certainly does not establish a rule forever cast in stone:

> In this country, the requirement [of due process] is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. *Legislation must necessarily vary with the different objects upon which it is designed to operate.* It is sufficient, for the purposes of this case, to say that legislation is not open to a charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual mode established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.

Id., 129 U.S. at 124, 9 S.Ct. at 234, 32 L.Ed. at 626 (emphasis added). In this case of course the object was not to insure competent practitioners but, rather was to reduce the cost and increase the availability of malpractice insurance. Such difference in purpose may obviously lead to a difference in method.

The second case relied upon by the appellant, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), is even further from the mark. The case stands for two propositions. The first is that the old right-privilege distinction exemplified by *Barsky* v. *Board of Regents*, 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829 (1954), is no longer valid. 353 U.S. at 239 n.5, 77 S.Ct. at 756, 1 L.Ed.2d at 801. The second is that the state may not penalize the exercise of first amendment rights by a licensee or an applicant for a license by denying or revoking an occupational license on that basis; *Schware* centered upon a refusal to permit a law school graduate to take the bar examination because of previous political associations. Although the court used broad language that has been seized upon by the appellant, the primary authorities cited leave no doubt that the court regarded the case as one involving first amendment rights. In both of the cases cited [*Slochower* v. *Board of Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956) and *Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952)], the court utilized the due process clause to protect first amendment freedoms. The point was more clearly made in *Schware's* compansion case, *Konigsburg* v. *State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), in which the court held that the power of a state to select its bar could not be exercised in an "arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association." 353 U.S. at 273, 77 S.Ct. at 733, 1 L.Ed.2d at 825. In addition, subsequent cases have interpreted *Schware* as one involving the first amendment. *See Baird* v. *State Bar of Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 69 (1967). This is patently not a first amendment case.

Finally, although it is not binding on this court, brief mention should be made of *McGuffey* v. *Hall*, 557 S.W.2d 401 (Ky. 1977), in which the Kentucky Supreme Court concluded that compulsory malpractice insurance was unconstitutional. The case is hardly persuasive because the Kentucky court's analysis was the exact opposite of that utilized by this court. It placed the burden on the state to justify the legislation and then found that "the provision for compulsory malpractice insurance has not been shown to be justified as an exercise of the police power." 557 S.W.2d at 414. Moreover, the decision rested on the Kentucky Constitution: "We express no opinion with respect to the due process provision of the federal Constitution, which in latter times has become something of a moving target, defying captivity." 557 S.W.2d at 414. The decision was also made in a vacuum, without reference to any legislative facts justifying the legislation:

> We have held the compulsory insurance requirement invalid because there is neither a showing nor anything else of which we may take judicial notice to indicate how it might tend to alleviate the problem of scarcity and high cost of medical malpractice insurance. *It is entirely possible that this deficiency can be remedied.*

557 S.W.2d at 416 (emphasis added). The findings of fact entered in this case conclusively remedy any "deficiency," if in fact one exists.

III.

CONCLUSION

In a nutshell, therefore, this court has for many years upheld broad utilization of the police power, requiring

only that legislation have some connection with the problem at hand. The findings entered in this case clearly show the existence of such a connection. The appellees therefore move the court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the matter by the Supreme Court of Kansas on the ground that the issue involved has long been decided and no longer presents a substantial federal question.

Respectfully submitted,

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APPENDIX "A"

Appendix to Barton County District Court
Journal Entry of Judgment

(Filed August 2, 1977)

APPENDIX I

Legislative Facts

1. The interim special legislative committee on medical malpractice met seven times. At each meeting, a number of representatives from legal, medical, and insurance groups were present. (Minutes of special committee on medical malpractice for June 24/25, 1975, July 22/23, 1975, August 27/28, 1975, September 23/24, 1975, October 14, 1975, October 28, 1975, November 13/14, 1975.)

2. The interim committee at its first meeting was told that the medical liability insurance problem was nationwide although the problem had perhaps not reached crisis proportions in Kansas. (Interim committee minutes, June 24/25, 1975, p. 2.)

3. The committee heard a synopsis of the views of medical providers, the insurance industry, the legal profession, and consumer groups. (Minutes, June 24/25, 1975, Attachment A.)

4. The committee was also told that the Kansas Medical Society had reported in February, 1975, that premiums had increased 50 to 150 percent during the past three years with some increases going as high as 300 percent. It was also told that a number of insurance companies writing coverage in the state would not accept new physicians for coverage, that the physicians who had had claims

filed against them had a chance at being canceled, and that a number of letters had been received from practitioners in the state who could not find an insurer. Finally, the committee heard that some sources had stated that the ratio of malpractice claims per doctor in the state of Kansas went from 1 in 33 in 1969 to 1 in 18 in 1973. (Minutes, June 24/25, 1975, p. 4, Attachment A.)

5. The committee was told that the Department of Health, Education and Welfare had commissioned a study of the medical malpractice insurance problem, and a copy of a summary of that committee's recommendations was made available to the interim committee members. (Minutes, June 24/25, 1975, Attachment B.)

6. Summaries of legislation proposed in the Congress and either proposed or enacted in various states were also given to committee members. (Minutes, June 24/25, 1975, Attachments G through O.) One of the states mentioned, Wisconsin, had passed a bill permitting its commissioner of insurance to establish a mandatory risk-sharing plan involving compulsory liability insurance for health care providers. (Minutes, June 24/25, 1975, Attachment N.)

7. The interim committee members also received a copy of an article setting forth the insurance industry's view of the problem, a newspaper report taking note of the increasing malpractice insurance problem in a number of states and a summary of the law of damages and of limitations of actions as they relate to medical malpractice. (Minutes, June 24/25, Attachments C through E.)

8. Finally, the committee heard Fletcher Bell, Kansas Commissioner of Insurance, and representatives of Kansas hospitals testify as to their view of the problem. (Minutes, June 24/25, 1975.)

9. Commissioner Bell told the committee that the insurance problem had not yet reached a crisis point in Kansas but that there were "some disturbing indications that this period of relative tranquility is coming to an end." Bell noted that there was already a potentially serious problem in Hutchinson and another in Wichita caused by the withdrawal of Lloyds of London from the medical malpractice insurance market. He noted that "everyone must share in the responsibility and everyone must be willing to contribute and perhaps even sacrifice a portion of the advantages they now have if we are to avoid some of the difficulties experienced in other localities." (Minutes, June 24/25, 1975, Attachment P.)

10. Frank Gentry, of the Kansas Hospital Association, told the committee that the problem in Kansas had become "extremely severe" in the last 18 months, especially with the withdrawal of the Argonaut Insurance Company from Kansas. Mr. Gentry cited as examples of the problem two increases in hospital premiums of 300 percent and one of 400 percent in the year immediately preceding. He also stated that although he had no proof he strongly believed that a national factor was computed into Kansas premiums in a manner that caused Kansas premiums to be higher than its claim experience would otherwise require. (Minutes, June 24/25, 1975, Attachment S.) Mr. Gentry also gave to each interim committee member an American Hospital Association report containing details of the problem on a state-by-state basis. (Minutes, June 24/25, 1975, Attachment T.)

11. Mr. Jerry Jorgensen, administrator of Stormont-Vail Hospital in Topeka, explained his view of the problem and noted that the medical liability portion of his hospital's insurance was on the increase. (Minutes, June 24/25, 1975, pp. 12-13.)

12. Mr. Steve Blaes, an attorney, told the committee that the insurance problem could drive hospital costs upward, cause increasing defensive medicine practices, force many older and part-time physicians into early retirement, cause young physicians to forego private practice entirely, and have an adverse effect on hospital bond offerings. (Minutes, June 24/25, 1975, Attachment U).

13. The interim committee members also received from Commissioner Bell copies of reports on medical malpractice insurance in Kansas prepared by him and dated March 14, 1975, and June 25, 1975. (Minutes, June 24/25, 1975, Attachments Q and R.)

14. In the March 14, 1975, report (Attachment B), Commissioner Bell noted that:

(a) The Kansas public could suffer from lack of adequate numbers of health care providers and from higher health care costs if the malpractice insurance problem were not resolved;

(b) Approximately 15 insurance companies were licensed to write malpractice coverage in Kansas, but the estimated Kansas premium volume represented only .7 percent of the national total of premiums collected;

(c) Of the companies writing insurance coverage in this state, the Medical Protective Company provided 50 percent of the coverage and the St. Paul Insurance Companies 36 percent. Hartford Accident and Indemnity Company wrote 6 percent and other companies 8 percent;

(d) Although the Kansas rate was relatively low, insurance companies were nevertheless reluctant to write coverage for additional health care providers because of the steadily increasing malpractice claim settlement costs and claims frequency potential;

(e) Data compiled by the Insurance Commissioner's office showed the ratio of claims per doctor to have increased from 1 in 33 in 1969 to 1 in 18 in 1973;

(f) The so-called "long tail" of medical malpractice insurance caused by claims incurred but not reported until sometime after the actual injury was causing substantial problems in establishing fair premiums;

(g) The unfavorable loss experience of the insurance companies on a national basis, changes in the public attitude and in legal opinions, and the inflated economy were all three causes of the lack of market stability in Kansas;

(h) Additional or higher rates would not induce availability of insurance;

(i) He had been informed that some individual medical practitioners had ceased to practice in Kansas because adequate insurance coverage was not available.

15. The June 25, 1975, report (Attachment Q) supplemented the March 14 report. In it, Commissioner Bell noted that:

(a) Two companies had requested rate increases of 200 percent or more.

(b) The Liberty Mutual Insurance Company had indicated a desire to withdraw from the state.

(c) New physicians and surgeons were frequently requesting the insurance department's assistance in locating adequate coverage, and without the direct assistance of the department, the necessary insurance coverage was difficult to obtain.

(d) Even the two largest carriers of malpractice insurance in the state did not write enough premium volume to be used as a creditable basis for rate formulation based only on the Kansas experience.

16. At its July meeting, the interim committee was told by Dr. Don George, interim association dean of the Wichita branch of the University of Kansas Medical School, that a group of private practitioners who taught at the Wichita Medical School had encountered substantial difficulty in obtaining coverage for their teaching activities. He noted that the problem was the only one of its kind to date but that if it became the trend it would result in the closing of the Wichita branch of the medical school or in the expenditure of state money to provide full-time faculty. (Interim committee minutes, July 22/23, 1975, p. 3.)

17. Dr. David Robinson, acting executive vice chancellor of the University of Kansas Medical Center, stated that doctors were practicing defensive medicine and were not attempting new techniques because of the insurance problem. He noted that it had been estimated that the insurance problem added 12 to 15 billion dollars per year to the public's medical bills. (Minutes, July 22/23, 1975, p. 5.)

18. The interim committee also heard Roy House, administrator of Wesley Medical Center in Wichita, Kansas, explain that the premium cost for Wesley had gone from $13,000 per year from mid-1958 through mid-1969 to $103,-000 per year from mid-1969 to mid-1973 and then to $158,-000 per year from mid-1973 to mid-1974. Mr. House also noted that Wesley's coverage had been canceled as of January 1, 1975, and that Wesley was able to obtain insurance only at a premium of $652,000 per year, a 300 percent increase that necessitated a $2 increase in the daily service charge. (Minutes, July 22/23, 1975, pp. 9-10). Mr. House told the committee that the malpractice problem was jeopardizing long-term hospital financing, posed a threat to emergency care, jeopardized high-risk services, threatened

medical education in Kansas, and posed problems in the development of out-patient programs. (Minutes, July 22/23, 1975, p. 10.) Mr. House told the committee that if the private sector could not make malpractice insurance available, the state should go into the insurance business because the problem was public in nature. (Minutes, July 22/23, 1975, pp. 11-12.)

19. Mr. Jim Clark, of the Kansas Optometric Association, noted that his group was facing substantial problems in availability of coverage. (Minutes, July 22/23, 1975, p. 15.)

20. Dr. John Travis, president of the Kansas Medical Society, told the committee that the malpractice problem had led to the practice of defensive medicine, had caused a deterioration in the climate between the doctor and the patient that adversely effected the quality of care, and could limit the availability of service. (Minutes, July 22/23, 1975, p. 15.)

21. Dr. Steven Brunner, a young family practitioner who opened his practice in Pittsburg in July, 1975, told the committee of the problems that he had had in obtaining coverage. He noted that the problems he had faced in Kansas had caused him to consider other states and that the insurance problem in Kansas could cause young family doctors to go elsewhere. (Minutes, July 22/23, 1975, pp. 15-16.)

22. Dr. Tony Mahaffee, of Baxter Springs, told the committee that the malpractice problem could cause him to leave Baxter Springs. (Minutes, July 22/23, 1975, p. 16.)

23. Dr. Dan Caliendo, of Wichita Emergency Care, explained the problems that his group had faced in obtaining the necessary coverage. He noted that they had ob-

tained coverage only after the direct intervention of the Insurance Commissioner's office and then at an increase of 2,000 percent. (Minutes, July 22/23, 1975, pp. 16-17.)

24. Dr. John Morgan, of Emporia, told the committee that when his company withdrew from the market, his group received repeated refusals from seven companies and was considering abandoning its practice when a local agent secured a policy for it. (Minutes, July 22/23, 1975, p. 17.)

25. Dr. Jim Leffler, of Wichita, told the committee that the problem was statewide and could be expected to increase in severity. He noted that one ophthalmologist's premium had risen from $1,000 to $9,000. (Minutes, July 22/23, 1975, p. 17.)

26. Dr. Bill VonRuden, of Hutchinson, explained the problems of his group. He noted that one part-time anesthesiologist was quoted a premium of $20,000 which was probably more than she made. He also noted that premiums for his group were $1,900 in 1974 and $41,000 in 1975. (Minutes, July 22/23, 1975, pp. 17-18.)

27. A Kansas Medical Society physician paper was distributed to committee members. The paper noted that health care practices were being adversely affected by the malpractice insurance problem and recommended a number of steps including a state-managed patients' compensation fund. (Minutes, July 22/23, 1975, Attachment K.)

28. The committee also heard extensive testimony from a number of groups during its meeting on August 27 and 28, 1975.

29. Lloyd Hall, executive secretary and general counsel of the Kansas Association of Osteopathic Medicine,

told the committee that the insurance problem was acute for new doctors. He indicated that his association supported the recommendations of the Kansas Medical Society. (Minutes of August 27/28, 1975, p. 2.)

30. Representatives of the podiatrists, chiropractors, and nurses also appeared. (Minutes, August 27/28, 1975, pp. 3-4.)

31. Representatives of the Kansas Bar Association, the Kansas Trial Lawyers Association, and the Kansas Association of Defense Counsel appeared to present position papers. (Minutes, August 27/28, 1975, pp. 5-8.)

32. Mr. Frederick J. Knox, vice president and chief actuary for the St. Paul Fire and Marine Insurance Company, explained the procedures followed by his company in establishing rates. Exhibits submitted by him to the committee members showed that St. Paul would incur a loss for the year 1969, the most recent year in which its complete cost was then known. (Minutes, August 27/28, 1975, p. 8, Attachment K.)

33. Mr. David W. Wilson, assistant vice president of the Medical Protective Company, explained his company's experience and submitted statistics showing that the company projected a loss on every dollar in premiums collected in 1974. (Minutes, August 27/28, 1975, Attachment L.) Mr. Wilson stated that a catastrophic fund to pay large judgments would encourage companies to come back into the malpractice insurance field. (Minutes, August 27/28, 1975, p. 10.)

34. Commissioner Bell once again appeared before the committee and presented a written report supplementing his previous reports. The report contained a number of recommendations that Bell said should be considered as a package. (Minutes, August 27/28, 1975, p. 10.)

35. The report noted that coverage was no longer available for new anesthesiologists and that anesthesiologists in general were facing substantial problems. (Minutes, August 27/28, 1975, Attachment O.)

36. The report also contained a detailed outline of reports of committees made up of insurance, medical, legal, and general public representatives, under the direction of the Commissioner, all of which studied specific aspects of the problem.

37. The report summarized the Kansas situation as follows:

> "Widespread availability in cost problems related to professional liability insurance for Kansas physicians, surgeons and hospitals were first encountered in the fall of 1974 when several of the major professional liability insurers requested significant rate increases. Although the percentage of the requested rate increases did not vary significantly from prior rate proposals (the average annual rate increase for the calendar years 1968 through 1973 is approximately 50 percent per year), the companies proposing these latest increases indicated that approval of the new rates would permit their companies to renew only existing policies; that is, even if the higher rates were approved, no new policies would be written by these companies in the state of Kansas. In order to prevent a major crisis from developing, this Department sought and received informal commitments from the major insurance companies, which have traditionally provided a majority of the Kansas physicians, surgeons and hospitals' professional liability insurance market, to renew all existing policies whenever possible and also provide additional coverage for any new physician or surgeon

> establishing or joining an existing medical practice in the state of Kansas. Furthermore, the assistance and cooperation of other admitted insurance companies were solicited, and informal agreements were made to the effect that all insurance companies would attempt to remain in the Kansas physicians, surgeons and hospitals' professional liability insurance market. Until late June of 1975, these informal commitments appeared to be providing a somewhat stabilized market for the health care providers insured by the admitted (regulated) insurance market. At this time, the first information of an impending withdrawal of the Lloyds of London underwriters, (a non-admitted or unregulated insurance facility) from the United States medical malpractice insurance market became available, and by July 1, 1975, the Lloyds had finally withdrawn from this essential market. As pointed out earlier in this report, this department is not able to provide a detailed evaluation of the impact of Lloyds' withdrawal. Other situations occurring in June, such as the reduction of policy limits by one major insurance company, adversely affected the Kansas malpractice insurance market; and just recently, two insurance companies have notified this department regarding the elimination of new and renewal primary and/or excess coverages for anesthesiologists."

The Commissioner closed the report with the warning that the problems faced in the state with continued availability of insurance "are most serious, and they must be dealt with and resolved as quickly as possible" and that if delays are encountered "the availability and cost problems encountered with medical professional liability insurance will become more serious than ever before." (Minutes, August 22/23, 1975, Attachment O.)

38. The next meeting of the interim committee was September 23/24, 1975. At that meeting Mr. L. M. Cornish, speaking for Kansas domestic insurance industry, told the committee that his group would accept a patient's compensation fund in which the first $100,000 of an award was paid by a private insurance carrier and the remainder from the fund. He told the committee that such a fund would be helpful in alleviating the problem and that his group would support it so long as it did not involve direct taxpayer support. He also noted that some states required insurance as a condition of licensure. (Minutes, September 23/24, 1975, pp. 2, 11.) Mr. Cornish distributed a comparison chart showing that the Kansas Medical Society, the Kansas Bar Association, and the Kansas insurance industry all supported a patient's compensation fund based upon an assessment on health care providers. (Minutes, September 23/24, 1975, Attachment L.)

39. The St. Paul Insurance Companies presented statistical data showing projections for a substantial loss for 1973 and 1974. (Minutes, September 23/24, 1975, Attachment C.)

40. The committee also discussed whether a patient's compensation fund should be mandatory to insure a large enough financial base for the fund to function or whether it should be optional. (Minutes, September 23/24, 1975, p. 6.)

41. At the next meeting of the interim committee, October 14, 1975, the chairman, Senator Wesley H. Sowers, recommended to the committee that it consider legislation establishing a patient's compensation fund financed by health care providers through a surcharge based on their premiums for $100,000 of private coverage. (Minutes, October 14, 1976, p. 7.)

42. The committee thereafter directed its staff to prepare a draft of a bill creating such a fund. (Minutes, October 14, 1975, p. 8.)

43. At its next meeting, October 28, 1975, the committee discussed the proposed bill that had been prepared by its staff in detail. (Minutes, October 28, 1975, pp. 6-8.)

44. At its last meeting, on November 13 and 14, 1975, the interim committee studied the details of the bill at length, made certain small amendments, and then approved it for introduction in the 1976 legislation. (Minutes, November 13/14, 1975.)

45. Thereafter, a report was prepared and filed with the Legislative Coordinating Counsel in January, 1976. The report contained 12 bills recommended by the committee for passage by the Legislature and the following conclusion:

> "The Committee found that the changes in the malpractice insurance market threaten health care in Kansas since some physicians believe they will not be able to continue in practice under such conditions. An adverse effect also arises from additional patient charges which result from passing on the increased cost of insurance through patient charges or daily room charges."

Report on Kansas Legislature Interim Studies to the 1976 Legislature Part II, p. 1155.

46. The bill in question, designated Senate Bill 646, was introduced in the Senate and referred to the Senate Committee on Public Health and Welfare. At its initial meeting, note was taken that various medical groups were recommending that the bill be amended to make partici-

pation mandatory. (Minutes, Senate Public Health and Welfare, January 20, 1976.)

47. At its meeting on January 26, 1976, the Senate Committee heard from David Fisher, who, on behalf of the Kansas Bar Association, stated that the bar association supported the health care stabilization fund to be created by Senate Bill No. 646. Mr. L. M. Cornish, on behalf of the Kansas domestic insurance industry, advised the committee that compliance with the act by purchasing insurance should be required of all health care providers and that the fund should be authorized to make installment payments. (Minutes, Senate Public Health and Welfare, January 26, 1976, pp. 1-2, Attachments A, D.)

48. Douglas Johnson, executive director of the Kansas Pharmaceutical Association, told the committee that pharmacists would like to be included within the definition of health care provider in all proposed bills. He recommended that insurance coverage be made compulsory for all health care providers and termed the patient's compensation fund concept "one of the major areas that will determine the success or failure of a solution to the problem." He also stated that "we feel that as professionals we owe it to other health care providers to contribute to that fund." (Minutes, Senate Public Health and Welfare, January 26, 1976, p. 2, Attachment E.)

49. Additional testimony was taken by the Senate committee on January 27, 1976.

50. Mr. Frank Gentry, executive director of the Kansas Hospital Association, distributed copies of material submitted to the interim committee on behalf of the Hospital Association. He also noted that mandatory participation would be recommended and that the Hospital Association would support that recommendation. He noted that "it

would be impractical to allow health care providers within any given category to cop out, thereby allowing the fund to be responsible for only the greater risk." He also indicated that the Hospital Association would support annual installment payments for large awards, a recommendation that would be forthcoming from the insurance department. (Minutes, Senate Public Health and Welfare, January 27, 1976, p. 1, Attachment A.)

51. Carl C. Schmitthenner, Jr., executive director of the Kansas State Dental Association, also appeared and noted that his group might have some objection to mandatory coverage. (Minutes, Senate Public Health and Welfare, January 27, 1976, p. 2.)

52. Judy Runnels, on behalf of the Kansas State Nurses Association, suggested to the committee that mandatory insurance for nurses could cause a number to simply stop working. (Minutes, Senate Public Health and Welfare, January 27, 1976, p. 2, Attachment D.)

53. Dr. Greg Snyder, on behalf of the Kansas Medical Society, told the committee that the society supported the proposed legislation. He also noted that one young doctor had elected to go to Oklahoma and another to Nebraska because of the more favorable malpractice insurance situation in those states. (Minutes, Senate Public Health and Welfare, January 27, 1976, p. 2.)

54. At its next meeting, on January 28, 1976, the committee heard from Commissioner Bell. He told the committee that the malpractice insurance market was in an extremely precarious condition and that if his office had not been able to assist health care providers who could not obtain insurance Kansas would have faced slowdowns, strikes, or other disruptions of medical services similar to those occurring in other states. (Minutes, Senate

Public Health and Welfare, January 28, 1976, Attachment A.)

55. Commissioner Bell also reported on a meeting held January 8, 1976, in his office with representatives of the Kansas Medical Society, Kansas Hospital Association, Kansas Bar Association, Kansas Trial Lawyers Association, Western Insurance Companies, Farmers Alliance Insurance Companies, Kansas State Nurses Association, Kansas State Dental Association, American Insurance Association, and Kansas Association of Property and Casualty Companies. He noted that all of those groups, with the exception of the nurses and dentists, had agreed that Senate Bill 646 should be amended to make the purchase of basic insurance coverage and participation in the health care stabilization fund mandatory for all health care providers as defined in the act.

56. Commissioner Bell then presented a series of amendments prepared by his office, one of which excluded nurses and dentists from coverage. He noted that mandatory participation in the fund was necessary to insure its success but that an exclusion for nurses and dentists, who had not been confronted with the serious malpractice problems, would not harm the solvency of the fund. (Minutes, Senate Public Health and Welfare, January 28, 1976, p. 2, Attachment A.)

57. Commissioner Bell also proposed that the act provide for payment of settlements or judgments in installments of $150,000 whenever the amount due from the fund was greater than that figure. He told the committee that such an amendment was necessary to insure that the fund would be adequate to meet the needs of all claimants by avoiding total dissipation by one or two extraordinarily large judgments or settlements. (Minutes, Senate Public Health and Welfare, January 28, 1976, Attachment A.)

58. On February 4, 1976, Commissioner Bell again appeared before the committee and told the members that in the 10 months immediately preceding the date of his appearance, his office had intervened in 87 cases involving health care providers in 45 different communities who were unable to obtain adequate professional liability insurance. He also addressed himself to whether compliance with the act should be mandatory, telling the committee that such a requirement would give the fund its best possible chance of success. He went on to say:

> "I realize that some of those expressing concern over the mandatory requirement are quite probably physicians who either don't purchase professional liability coverage at the present time or—more likely—have not yet encountered a problem with respect to its cost or availability. As I said earlier, I can understand and appreciate their feeling but in all sincerity, I believe their good fortune has blinded them to the realities of the situation. First—while they may have not yet been confronted with the problem of a cancellation or non-renewal notice or a call from their insurance agent informing them that their application for coverage has been declined—the chances are that they will experience this kind of situation if this session of the legislature fails to take meaningful and responsive action. Secondly, I believe they are ignoring the fact that the problem is not isolated to one particular medical specialty but even if it was I have to wonder if they have considered what would happen if suddenly there is no surgeon in the community to which they can refer a patient for a necessary operation because the surgeon was unable to obtain

or afford what he or she believed was adequate professional liability protection—or, if the surgeon is still there what happens if there is no anesthesiologist available. To put it another way—I know we have all considered the specialization of medical technology as one of the factors contributing to the medical malpractice problem, but I believe that some health care providers have apparently failed to recognize the fact that they too must now depend on specialists to an ever increasing extent. In other words, we have reached the point where a surgeon's problems are also a problem for the general practitioner—the anesthesiologists' problems are also a problem for the surgeon—and so on. As a result, the suggested amendment to Senate Bill No. 646 which incorporates the mandatory element is simply a continuation of this mechanism. All it does in a sense is suggest that just as the very specialties support and complement each other in their rendering of medical care they must also support and complement each other with respect to professional liability protection."

(Minutes, Senate Public Health and Welfare, February 4, 1976, Attachment A.)

59. Bell also told the committee, once again, that dentists and nurses could be excluded from coverage because they had not encountered problems and that the committee also might wish to consider adding pharmacists and optometrists. He warned, however, that removal of medical care facilities or persons licensed from the Healing Arts Act would in essence destroy the act. (Minutes, Senate Public Health and Welfare, February 4, 1976, Attachment A.)

60. On February 13, 1976, the bill was reported by the committee favorably for passage, with various amendments including mandatory coverage, exclusion of nurses and dentists, and provision for installment payments. Note was made in the minutes that the installment provision was to protect the fund. (Minutes, Senate Public Health and Welfare, February 13, 1976.)

61. The bill then went to the House and was assigned to the House Committee on Insurance. On March 2, 1976, the committee heard a detailed explanation of the bill and the rationale underlying its provisions. (Minutes, House Committee on Insurance, March 2, 1976.) The committee had previously considered a variety of other malpractice bills and had heard detailed explanations of the problem. (Minutes, House Committee on Insurance, January 28, 29, 30; February 4, 5, 6, and 11, 1976.) Also on March 2, a representative of the Kansas Association of Nurse Anesthetists requested inclusion for his group in Senate Bill 646. (Minutes, House Committee on Insurance, March 2, 1976, p. 2.)

62. The committee thereafter heard testimony from a number of groups, all of whom except the nurses and dentists supported the bill and its mandatory coverage provision. (Minutes, House Committee on Insurance, March 3, 4, and 5, 1976.)

63. Thereafter, the committee considered technical amendments to the bill, and on March 12 reported it favorably for passage. (Minutes, House Committee on Insurance, March 9, 10, 11, and 12, 1976.)

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IN THE

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OCTOBER TERM, 1977

NO. 77-1621

BYRON TIMOTHY LIGGETT, M.D. ..... *Appellant*

vs.

STATE OF KANSAS EX REL., CURT T. SCHNEIDER, ATTORNEY GENERAL OF THE STATE OF KANSAS, KANSAS HOSPITAL ASSOCIATION, THE KANSAS MEDICAL SOCIETY, THE KANSAS HEALTH CARE PROVIDER INSURANCE AVAILABILITY PLAN ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF JURISDICTIONAL STATEMENT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT

Pursuant to Rule 42 of the Rules of this Court, the Association of American Physicians and Surgeons, Inc., respectfully moves this Court for leave to file a brief *amicus curiae* in support of the Jurisdictional Statement in the

above-entitled case. Counsel for movant has, as of the date the within motion and brief is filed, received consent from counsel for the Appellant for the filing of same.

In support of the motion of the Association of American Physicians and Surgeons, Inc., for leave to file a brief *amicus curiae,* the Association states that it is a voluntary association formed by private, practicing physicians and surgeons in 1943. The Association is incorporated as a non-stock, non-profit corporation under and by virtue of the laws of the State of Illinois, and has its principle offices located in Oak Brook, Illinois. It is the largest association with nationwide membership in the United States devoted exclusively to representing the physician in the practice of private medicine. The Association has members in every state and territory in the United States, and in the District of Columbia. One of the primary objectives of the Association in recent years has been the safeguarding of the private practitioner's "right" to engage in his or her calling free from such arbitrary controls as found in compulsory medical malpractice insurance legislation.

In Kentucky, members of the Association successfully overturned that Commonwealth's compulsory medical malpractice insurance statute. *McGuffey, etc., et. al. v. Hall, et. al.,* 557 *S.W.* 2d 401 (Ky., 1977). The disposition of the Supreme Court of Kentucky has enabled the Association and its members to appeal to courts and state legislative assemblies that, in terms of a state's "police powers," the frontiers of legal thinking have been advanced. Though not discussed in the opinion of the Supreme Court of the State of Kansas hereinbelow, the case of *McGuffey, etc., et. al. vs. Hall, et. al.,* supra, was vigorously argued.

The accompanying brief *amicus curiae* espouses a fundamental philosophy of the Association and its

individual members, and presents an argument unique to the instant case. Of importance to the Association is the argument that a conflict does exist within the jurisdictions as to the Constitutionality of compulsory medical malpractice insurance legislation, and that a standard is necessary by which the several jurisdictions may be guided.

The Association, additionally, presents the argument, based upon the Fourteenth Amendment, that compulsory medical malpractice insurance legislation, such as K.S.A. 1976 Supp. 40-3042, is violative of the State's "powers of police," and, its compulsory nature bears no "reasonable relationship" to the purpose therefor. Upon the aforementioned arguments the Association of American Physicians and Surgeons, Inc., and its members prevailed in *McGuffey, etc., et. al., v. Hall, et. al.,* supra.

The accompanying brief *amicus curiae* in support of the Jurisdictional Statement presents a diverse perspective not presently represented which will assist in obtaining full consideration of issues critical to all segments of the public.

CONCLUSION

For the above-stated reasons, the Association of American Physicians and Surgeons, Inc., respectfully urges this Honorable Court to grant this motion for leave to file the accompanying brief *amicus curiae* in support of the jurisdictional statement.

Respectfully submitted,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

MAY IT PLEASE THE COURT:

This brief *amicus curiae* in support of the Jurisdictional Statement is filed by the Association of American Physicians and Surgeons, Inc., by Motion, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.

The Association of American Physicians and Surgeons,

Inc., a non-stock, non-profit corporation, was organized for the purposes of protecting and safeguarding the "right" of the practitioner of private medicine to engage in such a calling free from arbitrary and unreasonable controls. The Association has been active as an *amicus* or a party in such cases as *State of North Carolina Ex Rel Sarah T. Morrow, etc., et. al. v. Califano,* No. 76-0049-Civ-5 (E.D.N.C., Sept. 22, 1977), *affm'd.* *U.S.* (April 17, 1978) and *Association of American Physicians and Surgeons, Inc., et. al., v. Weinberger,* 395 *F. Supp.* 125 (D.C. Ill., 1975), *affm'd.* 423 *U.S.* 975 (1976). Importantly, the Association and its members successfully challenged the Kentucky Compulsory Medical Malpractice Insurance Statute in 1977. *McGuffey, etc., et. al., v. Hall, et. al.,* 557 *S.W.* 2d 401 (Ky., 1977). The Association firmly believes that the interpretation of the Supreme Court of Kentucky in *McGuffey* and that of the Supreme Court of the State of Kansas in the instant case as to considerations of the "police power" of the State and rationality and relationship of the compulsory nature of the legislation to the purpose or purposes for which it was enacted are irreconcileable. Hence, the Association, being highly active in this particular field, and having advanced the law in the field as a result of *McGuffey, etc., et. a., v. Hall, et. al.,* supra., has a deep interest in the case at bar. The background of the Association and other interests are detailed in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Association submits to this Honorable Court that a substantial federal question exists with respect to the instant case, and, that a conflict exists within several jurisdictions as to the application of considerations embodied in the Fourteenth Amendment to the Constitution of the United

States and their relation to compulsory medical malpractice insurance legislation.

The Association firmly believes that the Fourteenth Amendment does not admit of an interpretation so expansive as to permit a State, under the guise of the "power of police" to require a private, practicing physician to purchase medical malpractice insurance or forfeit his or her license to practice or freedom to practice medicine. Simply, it should be of no concern to the State to guarantee that anyone who might file a negligence action against a practitioner of private medicine will find a deep pocket. Whereas, the Association readily admits that a State may and should, in the interest of protecting its citizens from unhealthy conditions or actual harm, regulate certain aspects of the practice of medicine just as certain aspects of the practice of law are also regulated, nevertheless, the outlines for the regulation by the State of both the practice of medicine and law have been well defined, and cannot include a requirement that the practitioner purchase a policy of insurance as a condition of his or her continued practice.

A policy of insurance does not guarantee competence. It does not increase the availability of medical care, but, rather, restricts such availability. And, importantly, what if the amount of premium a physician (or lawyer or other professional) must pay eventually equals or exceeds the total coverage? Is there then a dollar figure one may attach to the Fourteenth Amendment before it must be invoked? The Association submits that this Honorable Court has addressed the question of the extent of a State's "power of police" over the professions a number of times, and given the States very clear and unequivocal standards. The Association respectfully urges that a substantial federal question exists, and that jurisdiction be noted. The "police

power" of the State cannot be extended as far as the State of Kansas has so attempted in K.S.A. 1976 Supp. 40-3402 (a).

Compulsory medical malpractice insurance is inherently unreasonable. To prevent an otherwise competent and capable professional man or woman from engaging in a lawful calling on account of his or her failure to secure an insurance policy is to delegate to the insurance industry an authority over the health, safety and welfare of the citizens of a State heretofore unknown by any private institution or person.

The Supreme Court of Kentucky relied upon the foregoing logic. *McGuffey, etc., et. al., v. Hall, et. al.*, supra. The Association submits that unless jurisdiction is noted, and, on the merits, the Supreme Court of the State of Kansas is reversed, a serious spiral may well begin which would undermine that necessary independence of the professions; result in the delegation to private institutions or persons of unprecedented authority, and, at the expense of that traditional and necessary limited State regulation, open the professions to manipulation and domination, economically and otherwise, by vested, financial interests.

What public good is served by guaranteeing a market for liability insurance carriers? What public good is served by a physician in private practice (or lawyer, or other professional person) being forced to close his or her office because insurance premiums have equalled the amount of coverage? What public good is served by guaranteeing a "deep pocket" to all litigants? What showing is there that physicians and surgeons in the State of Kansas or elsewhere are historically responsible for failing to pay claims against them, whether or not they are insured? The Association submits that there has been and could be no such showing. And, finally, how does such a requirement contribute to any reduction in the cost of medical care?

Compulsory medical malpractice insurance, simply, is an arbitrary and abusive exercise of power. The Fourteenth Amendment, and the precedents established thereunder by this Honorable Court, clearly, make such legislation unlawful.

A substantial federal question exists. The jurisdictions are in conflict. Jurisdiction must be noted in order that this Honorable Court might reaffirm its long-standing position with respect to the "power of police" of a State over the professions.

ARGUMENT

I

A DECISION BY THIS COURT WOULD ESTABLISH VALUABLE PRECEDENT AND RESOLVE A CLEAR CONFLICT AMONG THE JURISDICTIONS

In three States medical malpractice insurance legislation requiring the purchase of such insurance subject to loss of one's license or loss of one's practice has been questioned constitutionally, and, ultimately reached State Supreme Courts.[1] Hawaii, which enacted a statute not unlike that challenged here and the statute successfully challenged in Kentucky, repealed its medical malpractice insurance legislation.

There have been challenges filed against similar legislation in Pennsylvania, Oregon, Illinois and North Dakota. Where decisions have been reached by Courts of original jurisdiction, they are as diverse in their conclusions as those published opinions heretofore mentioned.

Likewise, to the detriment of the practice of private

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[1]Idaho, *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P. 2d 399 (1976), cert. den. 431 U.S. 914 (1976); Kentucky, *McGuffey, etc., et. al. v. Hall*, et. al., 557 S.W. 2d 401 (Ky., 1977); and the instant case.

medicine, health care institutions, which receive vast amounts of public monies, are requiring physicians to purchase medical malpractice insurance as a condition to acquiring or maintaining staff privileges. In response thereto State and federal courts, after determining the requisite "State action," have rendered varied and diverse opinions.[2]

The Association submits that an air of confusion exists within the medical community which must be resolved. That resolution must reaffirm those simple guidelines established by this Honorable Court in *Dent v. West Virginia,* 129 *U.S.* 114 (1889) and *Watson v. Maryland,* 218 *U.S.* 173 (1910). The fundamental standards which the Association urges this Honorable Court to reaffirm were well recognized in the decision of the Supreme Court of Kentucky. The Court stated:

> We therefore hold, as did the trial court, that the provision for compulsory malpractice insurance has not been shown to be justified as an exercise of the police power, in the absence of which any interference with the natural right of any individual or group to pursue a legitimate business or profession is a violation of [the Constitution][3]

McGuffey, etc., et. al., v. Hall, et. al., supra, at 414.

The conflict must be resolved, and that resolution must weigh in favor of the fundamental "natural right" which one enjoys to practice a lawful and honorable profession.

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[2] California, *Rosner v. Peninsula Hospital District,* 224 *Cal. App.* 2d 115, 36 *Cal. Rptr.* 332 (1964); Louisiana, *Pollock v. Methodist Hospital,* 392 *F. Supp.* 393 (E.D. La., 1975) (note question of judgment *in solido* peculiar to civil law); Arizona, *Holmes v. Hoemako Hospital,* 573 P. 2d 477 (1978).

[3] The aforementioned holding was based upon sections 1(5) and 2 of the Kentucky Constitution. It is important to note, however, that the aforementioned Kentucky Constitutional prohibitions relate to the use of "absolute and arbitrary power over the lives, liberties and property of freemen. . ." The law developed under the Fourteenth Amendment is not inapposite.

McGuffey, etc., et. al., v. Hall, supra, at 414, and *Holmes v. Hoemako Hospital,* supra, at 479 [the right to follow any lawful vocation or profession is constitutionally protected, c.f., *Meyer v. Nebraska,* 262 *U.S.* 390 (1923)].

A substantial federal question exists. Jurisdiction must be noted. The decision below dealt with an important Fourteenth Amendment question in a fashion which has raised doubts in other jurisdictions. The Association respectfully suggests that summarily to affirm that decision could well inhibit the careful and orderly development of extraordinarily significant constitutional principals. *Colorado Springs Amusements, Ltd. v. Rizzo,* 428 *U.S.* 913 (Opinion of Mr. Justice Brennan) (1976); Note, "Summary Disposition of Supreme Court of Appeals," 52 *B.U.L. Rev.* 373 (1972).

II

K.S.A. 1976 SUPP. 40-3402(a) IS REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A.

K.S.A. 1976 SUPP. 40-3402(a) EXTENDS BEYOND THE SCOPE OF THE "POLICE POWER" OF THE STATE OF KANSAS

The use of the term "police power" was, originally, derived from the Opinion of Mr. Chief Justice John Marshall in *Gibbons v. Ogden,* 9 Wheat. (22 *U.S.*) 1 (1824). Again, and with greater emphasis, the term "police power" emerged in Marshall's Opinion in *Brown v. Maryland,* 12 Wheat. (25 *U.S.*) 419 (1827)[4]

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4 Some Constitutional law scholars regard *Brown v. Maryland,* supra., as the beginning of the use of the term "police power." R. Roettinger, *The Supreme Court and State Police Power* (1957) at 10.

The classic definition of "police power" was delivered by Mr. Chief Justice Shaw in *Commonwealth v. Alger*, 7 Cush. (61 Mass.) 53 (1851) at 85. Mr. Chief Justice Shaw stated:

> The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, *not repugnant to the constitution*, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. (Emphasis added).

Early in the judicial history of the United States, the "police power" was discussed, largely, in response to the State and National governments' respective control over commerce.[5] Mr. Chief Justice Roger B. Taney defined "police power" as the

> . . . power of sovereignty, the power to govern men and things *within the limits of [the State's]* dominion. It is by virtue of this power that [the State] legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, *except insofar as it has been restricted by the Constitution of the United States*. (Emphasis added)

Pierce v. New Hampshire [The License Cases], 5 How. (46 *U.S.*) 504 (1846) at 583.

In the last half of the nineteenth century a formula, after voluminous legislation began to take shape identifying the nature of the State's "police power". The formula generally appears to be as follows: that a law purported to be enacted for the protection of the public will not be declared invalid, unless it shall be made clear to the Court that it was not open to the State legislature to find that it

[5] See *Gibbons v. Ogden*, supra.; *Brown v. Maryland*, supra.; and *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851).

had a real or substantial relation to the protection of the public health, safety, morals or welfare, or unless it is so clearly arbitrary or oppressive, or (as Mr. Justice Oliver W. Holmes, Jr., stated) "so unreasonable and so far beyond the necessities of the case as to be deemed a purely arbitrary interference with lawful business transactions." *Muller v. Oregon*, 208 *U.S.* 412 (1908). See also: *German Alliance Ins. Co. v. Kansas*, 233 *U.S.* 389 (1914); *Broadnax v. Missouri*, 219 *U.S.* 285 (1911); *Chicago, etc., R.R. v. Mc Quire*, 219 *U.S.* 549 (1911); Swayze, "Judicial Construction of the Fourteenth Amendment," 26 *Harv. L. Rev.* 1 (1912); Bird, "The Evolution of Due Process of Law in Decisions of the United States Supreme Court," 13 *Col. L. Rev.* 37 (1913); and, Warren, *The Supreme Court in United States History*, Vol. II (Boston, 1926) at 745.

Every exercise of "police power" is subject to fundamental Fourteenth Amendment requirements of being reasonable, and of not being arbitrary. *Reynolds v. La. Bd. of Alcoholic Beverage Control*, 249 *La.* 127, 185 *So.* 2d 794 (1965), *cert. den.* 385 *U.S.* 946 (1966); *Mutual Loan Co. v. Martell*, 222 *U.S.* 225 (1911); *Chicago, B & Q Ry. v. Illinois*, 200 *U.S.* 561 (1906).

A State's "police power" has, most frequently, been described as ". . . extending to making regulations promotive of domestic order, morals, health and safety." *Hannibal & St. J. R. Co. v. Husun*, 95 *U.S.* 465 (1877). The power embraces the "protection of lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals." *Patterson v. Kentucky*, 97 *U.S.* 501 (1878).

The "police power," the Association submits, is, fundamentally, a "protective" device. It "protects" or "extends to the protection of lives, limbs, health, comfort and quiet of all persons, and protection of all property within the State." *Slaughter House Cases*, 83 *U.S.* 16

(1872). However, such power is strongly qualified. Stated this Honorable Court in *Munn v. Illinois,* 94 *U.S.* 77 (1876) at 83-84:

> "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private. . . but it does authorize the establishment of laws requiring each citizen to conduct himself, and so use his property as not unnecessarily to injure another.

Again, the "police power" is a "protective" device. And, that "protection" will be deemed constitutional only if it does not interfere with some right which is purely and exclusively private. *Munn v. Illinois,* supra. A State's "police power" can be properly exercised only when there is a reasonable relationship to the public health, safety, morals or welfare. *West Coast Hotel Co. v. Parrish,* 300 *U.S.* 379 (1937); *Van Oster v. Kansas,* 272 *U.S.* 465 (1926).

If, in a given act of a State legislature, there is no benefit flowing to the public from the enforcement of said act, and that act restricts a fundamental right or individual freedom, the limits of the "police power" have been passed and the act must fall. *Fairmont Creamery Co. v. Minnesota,* 274 *U.S.* 1 (1927) *Atkins vs. Kansas,* 191 *U.S.* 207 (1903); Comment, 67 *Mich. L. Rev.* 360, 362 (1968). Certainly, if the Court can locate no relationships between the act in question and the public health, safety, morals or welfare, the act is unconstitutional. *Griswold v. Connecticut,* 381 *U.S.* 479 (1965); *Pierce v. Society of Sisters,* 268 *U.S.* 510 (1925); *Meyer v. Nebraska,* 262 *U.S.* 390 (1923).

The practice of medicine has always been one area of endeavor which States have deemed within their power to

regulate. Insofar as the practice of medicine affects the health and safety of the citizens of the State, it has been held to be an area of public concern, and such regulation is consistent with the Fourteenth Amendment. *Watson v. Maryland,* supra; and *Polhemus v. American Medical Ass'n.,* 146 *F. 2d* 357 (9th Cir., 1944).

The regulation of the practice of medicine, like all exercises of "police power", is not without limits. This Honorable Court established general outlines for the regulation of the practice of medicine in *Watson v. Maryland,* supra., at 176:

> It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people,and requiring for its successful practice general education and technical skill, as well good character, it is obviously one of those vocations which may be regulated to see that only properly qualified persons shall undertake its responsible and difficult duties. *To this end* many States of the union have enacted statutes which require the practitioner of medicine to submit to an examination by a competent board of physicians and surgeons, and to receive duly authenticated certificates showing that they are deemed to possess the necessary qualifications of learning, skill and character essential to their calling. (Emphasis added.)

A State's "police power" over the private practice of medicine, thus, must be directed to insuring that practitioners are properly educated and of good moral character; that medical schools maintain proper

standards;[6] that physicians maintain proper standards of conduct; and, that they conform to certain fundamental standards of ethics, i.e., avoidance of advertising (except where it my be deemed protected by the First Amendment), solicitation and unlawful criminal behavior. *Barsky v. Board of Regents of the University of the State of New York,* 347 *U.S.* 442 (1954).

To force one to purchase a policy of medical malpractice insurance or prohibit that individual, who, otherwise, is wholly competent in his or her field, from engaging in the practice of medicine simply does not fit within the aforementioned standards. In fact, the requirement borders on the ludicrous.

The State has no legitimate interest in guaranteeing that physicians (or any other professionals) will pay all civil claims. Such a scheme, as found in K.S.A. 1976 Supp. 40-3402 (a) cannot be justified on account of a shortage of insurance carriers in Kansas or the high cost of medical liability insurance premiums, for, requiring physicians to purchase such insurance does nothing to make insurance more readily available or less expensive.

As in the practice of law, a state can require high standards for qualification such as good moral character and proficiency before one may be licensed or otherwise enabled to practice, but those standards must have a reasonable and rational connection with the individual's competence and capacity to practice.
See: *Douglas v. Noble,* 261 *U.S.* 165 (1923) *Dent v. West Virginia,* supra.; *Watson v. Maryland,* supra.; *Nebbia v. New York,* 291 *U.S.* 502, 89 *ALR* 1469 (1934).

This Honorable Court must note jurisdiction, for K.S.A. 1976 Supp. 40-3402(a) cannot stand constitutional muster.

[6] See: *New Jersey Chiropractice Ass'n. v. State Board of Medical Examiners of N.J.,* 79 *F. Supp.* 327 (D.C.N.J., 1948).

B.

THE REQUIREMENTS OF PURCHASE OF MINIMUM AMOUNTS OF MEDICAL MALPRACTICE INSURANCE AS A CONDITION OF THE CONTINUED PRACTICE OF MEDICINE IS UNREASONABLE AND IRRATIONAL

For a State statute to make the purchase of an insurance policy a condition of a physician's "right" to practice medicine is unreasonable and irrational. Certainly, Fourteenth Amendment questions have always been scrutinized under the test of reasonableness and rationality of the given law. *Bibb v. Navajo Freight Lines,* 359 *U.S.* 520 (1959); *Triegle v. Acme Homestead Ass'n.,* 297 *U.S.* 189, 101 *ALR* 1284 (1936); *Nebbia v. New York,* supra.; *Standard Oil Co. v. City of Marysville,* 279 *U.S.* 582 (1929).

Reasonableness of any legislation must be found by examining whether those who must bear the regulation and surrender a liberty are one and the same as those whose actions created the problem sought to be corrected. For any State, conceptually, to enact legislation within its "police power", there must be a force within that State's jurisdiction which is or will adversely affect the general public, or certain individuals. If such a force, be it incompetent individuals practicing medicine or some business fraud, exists, that State may impose the proper remedy, even if it be destructive of an entire business enterprise. However, any limitation or penalty, to be valid within the dictates of the Fourteenth Amendment to the Constitution of the United States, must be exercised *against that which would be harmful, or has been doing harm to the public.* See: *Nebbia v. New York,* supra., at 510; *Breard v. City of Alexandria,* 341 *U.S.* 622 (1951).

The act in question, K.S.A. 1976 Supp. 40-3402 (a), simply cannot pass the test of reasonableness. The State of

Kansas, in enacting the statute, did not refer to physicians as being inherently negligent or historically negligent. There is no policy consideration which referred to physicians as being economically or financially irresponsible, or historically incapable or unwilling to meet judgments rendered against them in civil cases. Yet, under K.S.A. 1976 Supp. 40-3402 (a), the physicians are those whose liberties are surrendered, not the authors of the wrong sought to be remedied. Presumably, K.S.A. 1976 Supp. 40-3402 (a) was enacted to resolve the so-called "crisis" in medical malpractice insurance which briefly swept across the nation.

How is the general public served here? If a physician, such as the Appellant, fails to comply by purchasing an insurance policy, he or she will be prohibited from practicing medicine. Such would occur even if the physician involved was the only practitioner in a small, isolated, rural community, or, the most heralded neuro-surgeon in the area. How would requiring either of those persons to purchase an insurance policy or forcing them out of the practice of medicine best serve the general public? If there are or were "victims" of the so-called "crisis" in medical malpractice insurance, those victims are or were the physicians themselves. Yet, because of a situation over which they have no control and, thus, cannot correct, they stand in a position to forefeit their very livelihood.

To rationally and responsibly correct the so-called "malpractice crisis," the State must correct the source of the wrong whatever or whomever it might be. To exercise power to limit the rights or liberties of others, most of all the victims of the wrong, is abusive, irrational, irresponsible and wholly beyond the necessities of the case. *Muller v. Oregon,* supra. See also: *Davidson v. New Orleans,* 96 *U.S.* 97 (1878) and *Yick Wo v. Hopkins* 118 *U.S.* 356 (1886).

The very unreasonableness of the scheme may be found in the fact that the statute threatens a physician who may be the most highly competent vascular or neuro surgeon with loss of ability to practice medicine if he or she fails to purchase insurance. Even if that physician has never had a civil lawsuit filed against him or her, it would make no difference.

Who in society is being protected under K.S.A. 1976 Supp. 40-3402(a). Most likely, only the insurer, and those civil claimants who would want a "deep pocket" guaranteed.

This Honorable Court must, the Association urges, note jurisdiction, and reverse the decision of the Supreme Court of the State of Kansas.

C.

K.S.A. 1976 SUPP. 40-3402(a) IS REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT AMOUNTS TO A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It has long been established in the law that an individual's pursuit of a lawful occupation is "property" within the meaning of the Fourteenth Amendment. *Louis K. Liggett Co. v. Baldridge,* 278 *U.S.* 105 (1928). Insofar as physicians are concerned, their profession embodies a variety of rights of a very fundamental nature which arise out of their relationship with their patients. The physician, therefore, has a commanding reason, constitutionally, to practice the profession free from arbitrary interference. An attorney of law is in a similar position.

Speaking of the practice of medicine being a "property" right, Mr. Justice Hugo L. Black, dissenting in *Barsky v. Board of Regents of the University of the State of*

New York, supra., stated, at 459:

> I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is. . . a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property. Such a right is protected from arbitrary infringement by our Constitution.

The right to pursue a lawful occupation free of unreasonable restraints and infringement was given its greatest security in *Meyer v. Nebraska*, 262 *U.S.* 390 (1923), wherein the Court Stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed (by the Due Process Clause of the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life. . . and generally to enjoy those privileges long recognized at common law essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, supra., at 399. See also: *Dent v. West Virginia*, 129 *U.S.* 114 (1889).

The Supreme Court of the United States has said repeatedly that "Where certain 'fundamental rights' are involved. . . regulation limiting those rights may be justified only by a 'compelling state interest'. . . and. . . legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe v. Wade*, 410 *U.S.* 113, 155 (1973). In addition, the legislative enactment or regulation must be "reasonable" and not arbitrary or capricious. *Mutual Loan Co. v. Martell*, supra., and *Chicago, Burlington & Quincy Ry. v. Illinois*, supra.

There simply is no reasonable or rational basis for the State to threaten to deny, or, in fact, deny a physician or lawyer or other professional person from practicing his or her calling on account of the refusal to purchase malpractice insurance. There is no cogent reason for leaving the professions at the mercy of an industry which could, potentially, price them into oblivion. Likewise, there is no cogent reason for placing such an infringement upon the property of the physician since he or she, alone or in conjunction with others, cannot correct the wrongs sought by the Legislature to be corrected.

Unequivocally, private property is not held at the "mercy of the legislature." *Munn v. Illinois*, supra. Legislation "must have limits or the 'contract' and 'due process' clauses are gone." *Pennsylvania Coal Co. v. Mahon*, 260 *U.S.* 393 (1922). "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, supra.

To require a physician to purchase medical malpractice insurance or forego the practice of medicine exceeds the State's "power of police," and is a "taking," a denial of property, without due process of law.

This Honorable Court must note jurisdiction, and reverse the Supreme Court of the State of Kansas.

CONCLUSION

For all the foregoing reasons, the Association of American Physicians and Surgeons, Inc., as *Amicus Curiae*, and in the interest of private, practicing physicians, respectfully requests this Court to note jurisdiction and declare K.S.A. 1976 Supp. 40-3402(a) unconstitutional.

Respectfully submitted,

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